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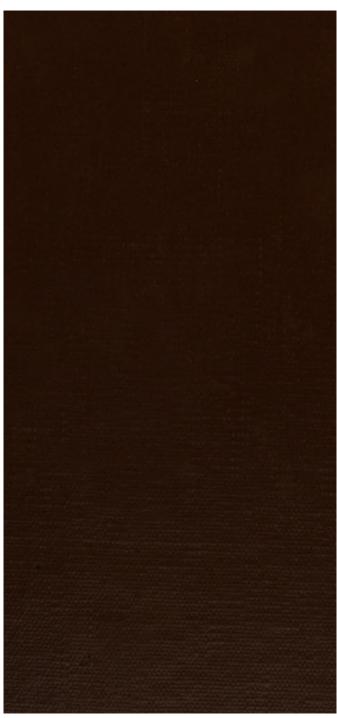
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ARGUED AND DETERMINED

IN THE

# Court of King's Bench,

FROM MICHAELMAS TERM, 26th GEORGE III.

TO

EASTER TERM, 27th GEORGE III.

BOTH INCLUSIVE.

WITH TABLES OF THE NAMES OF CASES AND PRINCIPAL MATTERS.

BY CHARLES DURNFORD AND EDWARD HYDE EAST,
OF THE TEMPLE, BSQUS.
BARRISTERS AT LAW.

Si quid novisti rectius istis, Candidus imperti; si non, his utere mecum.

F Hor.

VOL. I.

FIRST AMERICAN FROM THE LAST LONDON EDITION.

PHILADELPHIA:

PRINTED FOR P. BYRNE, LAW BOOK-SELLER.

1811.

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# THE desire universally expressed for a periodical work of this nature was the principal inducement which led the compilers of these Notes to sub-

ment which led the compilers of these Notes to submit them to public view; without any design of entering into a competition with any modern reporter: Should they meet with approbation, they mean to pursue their plan of publishing the Notes of Cases adjudged in the Court of King's Bench within a short time after each term.

In a work of this kind all that can be expected is accuracy; to polish and digest properly requires long time and much labour, which would defeat the intention of this publication; the primary object of which is to remedy the inconvenience felt by every part of the profession of waiting two or three years, till some gentleman of experience and ability has collected matter sufficient to form a complete volume.

With these motives, the publishers beg leave to lay in their claim to the candour of the profession.

TEMPLE, January 20th, 1786.



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# **PREFACE**

TO THE

### SECOND EDITION.

THE liberal encouragement which this work has met with having rendered a second edition necessary, we could not omit so favourable an opportunity of expressing our gratitude to the profession, whose countenance has so highly honoured our endeavours; and particularly of returning our public thanks to those gentlemen, by whose friendly assistance, in a ready communication of notes and papers, we have been enabled to present these reports in a more correct and finished state than we could otherwise have done.

While we gratify our own feelings in this public acknowledgment of those favours which we have already received, permit us to hope for a continuation of them.

Temple, Nov. 6th, 1786.

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# JUDGES

OF THE

### COURT OF KING's BENCH,

WILLIAM EARL of MANSFIELD, Lord Chief Justice.

EDWARD WILLES, Esq.

Sir William Henry Ashhurst, Knt.

FRANCIS BULLER, Esq.

Sir Nash Grose, Knt. (appointed February 1787.)

RICHARD PEPPER ARDEN, Esq. Attorney-General.

ARCHIBALD MACDONALD, Esq. Solicitor-General.

### **CASES**

#### ARGUED AND DETERMINED

IN THE

# COURT OF KING'S BENCH,

IN

MICHAELMAS TERM,
IN THE TWENTY-SIXTH YEAR OF THE
REIGN OF GEORGE III.

### The KING against STACEY,

1785.

BEARCROFT had moved for an information in the nature The Court of a quo warranto against the defendant, to shew by will not what authority he claimed to be a freeman of the borough of grant an in-Winchelsea. The point to be considered was, whether one the nature Marten was duly elected mayor of the said borough in the of a quo year 1769; on which election the validity of the defendant's warranto franchise, as a freeman, depended. It appeared from the af-years (a) fidavits that the corporation of Winchelsea consists of a may-quiet posor, jurats, and freemen; that the election of mayor is made session. annually by the body of freemen out of the jurats, which latter Length of time, though have no right to vote therein; that in the year 1769, in the less than 20 absence of the mayor, it became a question who ought to pre-years, may side at the election of a successor, and on taking counsel's induce the opinion (Mr. Dunning), it was thought adviseable for the old-fuse it. est freeman to preside thereat; that the name of the oldest Whether a freeman then was Knight, but as to the fact, whether Knight derivative or Marten actually presided, the affidavits differed: but the title can be entry made by the town-clerk was as follows: "At a special when the "court held at the Guildhall of this borough pursuant to the person, from "statute of the 11 Geo. 1. c. 4. before - Marten, Esq. and whom it "— Dawes, Esq. and other jurats, and the freemen of the died in the " said undisturbed possession

of it. Sucre? Such title shall not be impeached by those who have acquiesced and acted under it (b).

<sup>(</sup>a) Vid. R. v. G. Peacock, post 4 vol. 684. & stat. 32 Geo. 3. c. 58; by which the time for impeaching a title to a corporate office is limited to 6 years.
(b) Vid. R. v. G. Symmon, post 4 vol. 223. & R. v. Mortlock, post 3 vol. 800.

1785. "said corporation, — Marten, Esq. was unanimously elect"ed mayor."

The King against STACEY.

That the election was then acquiesced in by all parties; and that *Marten* has been several times since elected mayor.

A similar application was made to the Court last term: but as it was made by two of the freemen of the borough, who were present at, and acquiesced under, the election in 1769, the Court dismissed the application.

The present motion was made in the names of seven persons some of whom had no concern with the corporation; and the others had not resided in the borough for many years, on which account their freedom was called in question, and disallowed in some of the affidavits. Two of the present applicants acknowledged that they came before the Court at the instance of the two persons who made the former application.

Lee now shewed cause, and contended that the Court had never granted an information to impeach a derivative title, where the original title was undisputed by the same parties, and the possessors had died in the quiet enjoyment of it. He cited The King and Spearing (a) and the Winchelsea causes in

4 Burr. 1126. 2022. 2120. 2277,

Rearcroft and Erskine in support of the rule. The charter is the law of the corporation; the corporators must be judged by it; and notwithstanding any long usage to the contrary, all their proceedings, not warranted by the charter, are void. The act of 11 Geo. 1. c. 4. points out two remedies, if they do not elect on the charter-day. They may either proceed to election the next day, and if the mayor or other proper officer be absent, the next in order is to fill his place; or secondly, they may apply to this court for a mandamus: but here they have neither pursued the charter, nor the directions of the statute. They then cited The King v. Luther (b).

Lord MANSFIELD. I remember when it was so much the practice of the Court to grant quo warranto informations as of course, that it was held prudent never to shew cause against the rule, for fear of disclosing the grounds on which the party went. But now, since these matters have come more under consideration, it is no longer a motion of course; and the Court are bound to consider all the circumstances of the case, before they disturb the peace and quiet of any corporation. The next thing which the Court took into their consideration was the length of time, within which they would grant informations. It was customary never to refuse informations for

(a) Post, 4. a. (b) M. 24 G. S. B. R.

1785.

against

BIACKY.

any length of time; but as the inconvenience and vexation of this were plainly perceived, the Court were desirous to go by a certain rule; and therefore, as the time was indefinite by the The Kino common law, and fixed by no statute, they drew a line by anabgy to the statute of limitations in ejectments; they drew it for twenty years: and this has been acquiesced in by the bar. and in parliament, where it was once mentioned. Now no person can apply for an information in opposition to enjoyment and undisputed possession for twenty years. Such a title shall on no account be impeached by any private person; yet still the King may prosecute by his Attorney-General.

But when the Court laid down the general rule, they also aid that it might be refused within twenty years upon other direumstances to warrant the Court to say, "You shall not make use of the King's name for such and such purposes." The Court is bound to guard the quiet of corporations; and the statute 11 Geo. 1. c. 4. was passed in order to insure them

security and tranquillity.

Now as to the circumstances of this case, the Court know not the real prosecutors, but they will ask, why do such persome come for redress? There is no individual among those who apply to the Court at present, who says my franchise is hurt (a). Who are you? What concern have you with the comoration? Only one of the King's subjects; I have no conom. What do you come for? To dissolve the corporation, and to disturb its peace. Then what is to be taken advantage of here? a mere blunder. They mean to act right under the statte—they take counsel's opinion.—There is no usurpation on the crown—they acquire no new privileges—there is no derence of opinion at the time-they are unanimous. the blunder had been discovered, it might have been oured directly. The constitution of the borough is not changed or altered in any shape. There are many circumstances in this case why the Court should not interfere by granting an informaion. No precise rule can be laid down in these cases; but all the circumstances taken together must govern the discretion of the Court. I refer you to the case of the King and Murica (b).

Upon the other point, it is clear that this question originates from the same persons who made the application last term; who were present at the time, and consented to these acts, and laid

<sup>(</sup>a) In R. v. Kemp, H. 29 G. 3. B. R. the Court said, that where the party aplying was a stranger, they would only require a stronger case to be made for the leformation.

<sup>(</sup>b) 4 Burr. 2120.

### CASES IN MICHAELMAS TERM,

1785.

laid by: therefore I am clear on that ground also that the rule

should be discharged.

The King against Stacey, Willes and Ashhurst, Justices, concurred.

BULLER J. There is no doubt but that this second application originates from the same party: and where a person assents to an act, and derives and enjoys a title under it, it shall

not lie in his mouth to impeach it.

As to the other point—the rule of twenty years is to be sure a great length of time, and if the Court should at any time be disposed to narrow that rule, I shall certainly concur in it. It is not a new idea; it arose so long ago as in the reign of George the Second. I have a manuscript note of a case where the Court refused a rule on an application of this sort, on the ground of length of time, which was only fourteen years. Therefore the length of time, though less than twenty years,

is a strong ingredient.

Another point has been made, how far it is competent to go into objections against a derivative title, when the original holder died in the undisputed possession of it. This question has never been precisely determined, nor will I enter into it now. But where the parties themselves have acquiesced, I think it is a strong reason why the Court should not suffer them to impeach the original title. In the case of The King and Spearing, mentioned by Mr. Lee, the Court doubted: they let the information go, because the question had never been determined. But on the other ground mentioned by my Lord, I think the rule should be discharged (a).

Rule discharged (b).

(a) The next day Mr. J. Buller read the following note of the King and Speuring, cited at the bar. Rex v. Spearing, tried at the Spring assizes at Winobester, before Blackstone, J. 1771, where there was a verdict for the defendant. Spearing had been sworn in before the Duke of Bolton, as mayor of Winobester. The record contained twenty issues; but the only one material to this case was the 19th, which was that the Duke of Bolton was not mayor: for he was not an inhabitant at the time he was chosen, nor for some time before; and so not eligible. Blacktone, J. would not suffer the parties to go into evidence at that distance of time after the death of the Duke of Bolton, to prove him not an inhabitant; but merely whether he was mayor or not, which the book shewed; that is, he would not suffer the title to be imeached after the death of the person from whom it was derived. As he had in fact been mayor, it should be taken that he had been regularly so.

And also this note of The King v. Pike and Braddock, Tr. 20 Geo. 2. Informations had been moved for in the nature of quo warrantos against the defendants, after a quier possession of fourteen years. The Court said they would not suffer the title to be gone into. Davy, serjeant, who moved for the information, said that one had been granted against one Johns after twenty years possession: sed non allocatur; for he had preserved his office by fraud and mal-practices, but here

there had been an undisturbed enjoyment.

(b) Vid. R. v. Stepbens, 1 Burr. 433. 1 Black. Rep. 470 R. v. Carter, Comp. 59.

CORBETT against POELNITZ and ANN his Wife.

1785.

THE declaration stated that the defendant Ann, before sert, living her intermarriage with Baron Poelnitz, was the wife of apart from Lord Percy; that afterwards they agreed to live separate; her husthat accordingly such separation took place; and that the de-having a sefendant Ann had a competent maintenance of 1600l. per an-parate mainnum settled on her by deed. That afterwards the said Ann, tenance, may before her intermarriage with the defendant, Baron Poelnitz, be sued as u and whilst she was so covert with the said Lord Percy, and feme sole also whilst she so lived separate and apart from the said Lord (a), and her Percy, and also whilst her said maintenance from the said Lord second hus-Percy was duly secured and paid to her, to wit, on the 29th ble for such November, in the year 1776, at London aforesaid, &c. in considebt. deration that the plaintiff, at the special instance and request of the said defendant Ann, and for and in consideration of the sum of 9001. paid by one Abraham Chambers to the said Ann, had then and there become held and firmly bound, together with the said Ann, to the said Abraham Chambers, by their joint and several bond, in 1800/. conditioned for the payment of an annuity of 150% during the natural life of the said Ann, and had also at the like special instance and request of the said Ann, together with the said Ann, executed a warrant of attorney for confessing judgment on the said writing obligatory for 1800l. and costs of suit, at the suit of the said Abraham Chambers, undertook, and to the said plaintiff then and there promised faithfully, to indemnify him against the said bond and warrant of attorney. That afterwards, and after the said promise, the marriage between the said Lord Percy and the said defendant Ann was dissolved by act of parliament, by which the same provision of 1600l. per ann. was continued and secured to her for her life. That afterwards, in March 1780, the said Ann was married to the defendant, Baron Poelnitz. That afterwards, and after the marriage of the said Ann with the said Baron Poelnitz, to wit, on the 29th August 1780, 2621. 10s. became payable to the said Abraham Chambers, by virtue of the condition of the said bond, for one year and three quarters, ending on the said 29th August 1780. That afterwards the said Abraham caused to be entered of record, upon and by virtue of the said warrant of attorney, a judgment in his Majesty's court of King's Bench at Westminster, as of Trinity

A feme co-

(a) Vid. Constson v. Collison, 2 Bro. Cb. Cas. 377: & H. Bl. Rep. 334; & Gilbrin v. Brown, post. 4 vol. 766. 1 Ld. Ray. 147.

CORRETT
against
POELNITZ.

term in the 20th year of the present King, at the suit of the said Abraham, against the said Ann and the said plaintiff, upon the said writing obligatory for the said sum of 1800l. and 63s. for costs; whereupon the plaintiff, to prevent his being taken in execution upon the said judgment, afterwards, on the 6th November 1780, was obliged to pay, and did pay, to the said Abraham Chambers the said sum of 262l. 10s. together with 5l. 19s. for costs: yet that the said Baron Poelnitz, and Ann, had not paid him, the said plaintiff, the said sums of 262l. 10s. and 5l. 19s. or indemnified him against the payment, thereof, &c.

Plea, the general issue. And verdict for the plaintiff.

Bearcroft had moved in arrest of judgment.

Lee and Wood now shewed cause on behalf of the plaintiff, and observed that the single question here was, whether a feme covert, living separate from her husband, and having a competent maintenance secured to her by deed, could contract in such a manner to bind herself, as the present defendant had done? In determining this question, they relied principally upon two late decisions; the one of Ringstead and Lady Lanesborough, Hil. 23 Geo. 3. B. R. The other of Barwell and Brooks, Hill. 24 Geo. 3 B. R.

The first of these was an action for goods sold and delivered. Plea, Coverture. Replication, that she lived separate from her husband at the time of making the aforesaid promises, and that she had a large and sufficient maintenance To this there was a special demursecured to her by deed. rer, for that the replication offered to put in issue matter foreign to the matter pleaded in bar; and joinder in demur-The case was twice argued, and Lord Mansfield went very fully into it, and decided that the action was maintainable. They contended that this was a case of a similar nature; and that there was even an additional circumstance here, inasmuch as the allowance was settled on the defendant by act of parliament; and her present husband still enjoys it. objection taken to Barwell and Brooks (which was a similar action) was, that the husband ought to have been sued, because he resided in the same country, and they relied on a circumstance in the former case of Lord Lanesborough's living in Ireland; but it was answered by the Court that the local residence of the husband made no difference; if the husband was liable at all, it could make no difference where he was. then mentioned a case (a) (which Mr. Lee remembered) before Tates, Justice, on the northern circuit. That was upon a **B**Gte

(a) Sparrow v. Carrutbers, cited in 2 Black. Rep. 1197.

note of 10% given by a woman who kept a public-house for some malt, upon which the action was brought. Plea, the ge-The defence upon the evidence was coverture: CORBBY T neral issue. the replication in evidence that her husband had been transported, and his time was not yet expired. The question was, whether she was liable. Yates, Justice, thought that the Court must consider the transportation as suspending her disability.

(Lord Manefield recollected a similar case before him some time ago at Maidstone, which he had determined in the same manner.)

They then cited Pearson v. Meadon, 2 Blac. Rep. 903. and

Lister's case, 8 Mod. 22. (a).

It was next insisted, that if the defendant Ann were liable to be sued originally, as appeared clearly from the several determinations, her subsequent marriage could make no difference; yet however, that the present husband must be joined

in this action by way of conformity.

Bearcroft, Ershine, and Law, contra, maintained, that the present question was new, and different from any of the former determinations. That the contract of a married woman was not only voidable, but actually void on this principle, that she ought not to contract to bind her husband, on account of his superiority over her; nor herself, because she has not the administration of any property. Thus stood the law formerly: but in modern times the law allows a woman to have a separate maintenance, which amounts only to an exception to the genemi rule. This gives a property to some purposes; it is to enable the wife to do that which the husband ought to have done, to provide herself with necessaries: but she is entitled to nothing more than a maintenance. Now, is this a case for maintenance? It is rather to sink the fund from whence the maintenance is to come. In Bull. Ni. Pri. 134. it is said, that the contract of the wife binds the husband no more than the contract of a servant. Vide 2 H. 4. 7. Co. Lit. 183, a. Privileges and disabilities are always reciprocal: whenever the law raises a fund for a person, it gives him a power to the extent of that fund, but no further. This fund, being given for necessary maintenance, is only liable for necessaries. Here Lady Percy could not have sued alone: and if a legacy had been left her, her husband would have taken it. This case is distinguishable from Lady Lanesborough's in the circumstance of the husband's

(a) Vid. Gilb. Hin. C. B. 246. Gage v. Linter, 4 Vin. Abr. 178.

husband's absence abroad. Moor, 851. Co. Lit. 132. b. Hatchett and another v. Baddeley, 2 Black. Rep. 1079. Lean v. Schutz, 2 Black. Rep. 1195. In Turton v. Lady Worsley, Mich. 24 G. 3. B. R. there was no decision on the point, though it was twice argued; which proves the caution of the Court how they extended the rule (a).

The Court have gone as far as this, that when a wife agrees to receive a separate maintenance, she shall be answerable for such maintenance: but that does not prove that she is so far a feme sole as to be able to make or bind herself by every spe-

cies of contract.

Lord MANSFIELD Ch. I. The facts lie in a narrow compass, and admit of no doubt. Lord and Lady Percy, by a deed, mutually agreed to live separate; neither can break this agreement (b); and a large maintenance is settled on her for her own private separate use as a feme sole to all purposes, the same as if she were unmarried. The claim upon which this action is founded is of a most meritorious nature. Lady Percu applied to the plaintiff: he considered her as a feme sole, and became surety for her: she promised to indemnify him, and the contract was concluded under a firm belief on both sides that it was perfectly valid and binding. In justice then she ought to pay this debt. But then to encounter this. there is a rule of positive law, which is to be adhered to and preferred, though in some particular cases it may seem productive of hardship and oppression. By this general rule, a married woman can have no property real or personal. Her contracts are entirely and universally void; for her contracts even for necessaries are the contracts of her husband: she cannot be sued or be taken in execution. This is the general rule. But then it has been properly said, that as the times alter, new customs and new manners arise: these occasion exceptions, and justice and convenience require different applications of these exceptions within the principle of the general rule.

The question then is, Whether it is so here? Whether under the circumstances of the present case a married woman should or should not be sued solely? Exceptions have been made in this very case. Where a husband is in exile, or has abjured the realm, and credit has been given to the wife alone, justice says she must pay; for the husband cannot be sued. So it is in the case of transportation; though the case is not exactly

(a) 1 Vern. 326. 1 Vez. 518.

(b) 1 Burr. 542.

exactly the same; for there the absence is only temporary, be- 1785. cause the husband may come over and be sued afterwards. Why then is it so established? because the wife acts as a sin- Cornert gle woman, gains credit as such, receives the benefit, and shall against be liable to the loss: and where she has an estate to her separate use, in justice she ought to be liable to the extent of it. In modern days, a new mode of proceeding has been introduced, and deeds have been allowed under which a married woman assumes the appearance of a feme sole, and is to all intents and purposes capacitated to act as such. In the ancient law there was no idea of a separate maintenance; but when it was established, what said the courts? that the husband shall not be liable even for necessaries; and they said so, because convenience and justice require it.

In the present case no distinction has been taken at the bar, whether, supposing Lady Percy to be liable, her second husband is so? And they have done right; for so he must cerminly be. The only question then is, whether a woman married, but living separate from her husband by agreement, having a large separate maintenance settled on her, continuing notoriously to live as a single woman, contracting and getting credit as such, and the husband not being liable, shall be sued as a feme sole? I think she should; it is just that it should be so.

I am of opinion that the present case is quite determined by the two late ones which have been cited, which do not rest upon one or two circumstances, as contended, but upon the great principle which the Court has laid down, "that where a "woman has a separate estate, and acts and receives credit as "a feme sole, she shall be liable as such." There is the same justice in this case, nor can I see any difference between them. Willes, J. concurred.

Ashhurst, J. It seems to me, that to decide the present question we need only consider the reasons on which the incapacities of a feme covert are founded; not on the same ground as those of an infant, whose disabilities arise from a want of discretion; but first, because she has no property; and secoadly, because it would be unreasonable to permit the wife to effect the property of her husband, except where he will not allow her necessaries, in which case her contracts are the contracts of her husband. Now, where a woman has a separate maintenance, and the husband cannot be charged, it follows naturally that she must; and if so, we cannot draw a precise line, and say, she shall be liable for this, and not for that; for her incapacity, arising from want of property, being once re-Vol. f.

POBLNITZ.

moved, she is in my opinion, suable for all. But if, as was supposed, she were only liable in respect of her separate main-CORBETT tenance, she could not be liable generally, but only so long as the maintenance continued, after the manner of an executor. as long as assets remain in his hands. That however cannot be: if she exhaust her whole fund, it is her own folly, but does not render her less liable. As to her being only liable in respect of her first settlement, such a doctrine was never before contended. If she be liable at all, she is liable generally; and that not only for necessaries, but for all contracts.

I think the other two cases govern this, and that the rule for arresting the judgment must be discharged; for she gained a general capacity to contract debts, and consequently her se-

cond husband takes them; for he takes her cum onere.

BULLER, J. The only considerable distinction to be found between this case and that of Ringstead and Lady Lanesborough is the non-residence of Lord Lanesborough: but that is entirely done away by what the Court said in Barwell and Brooks, that it made no sort of difference whether the husband was in England or not, for he was not liable; which was the great principle that influenced the decision, and not his local situation. Hence then we have only to consider whether it is possible to draw the line, that the wife shall only be liable for necessaries. The opinion of the two judges in Hatchett and Baddeley went wide of it, and it has never been much pressed: but I think the objection has no force, for if she has a power of contracting, it must be a general one. A question has been made as to the fund that is liable; and it has been asked, what if she alien the whole? The argument however stops short; for it ought to have shewn that the husband would again become liable in that case: but there is no colour to say, that, if the wife spends the whole of her settlement, her husband shall be liable even for necessaries. As to the prudence of the measure, that is no ground on which the Court can found their decision.

In Lady Lanesborough's case, the only question was, whether she could acquire a capacity to contract? It was determined that she could; and therefore, as I think that case must govern the present, I am of opinion that the plaintiff may recover.

Rule for arresting the judgment discharged.

### VAISE against DELAVAL.

1785.

TPON a motion by Law for a rule to set aside a verdict, Affidavit of upon an affidavit of two jurors, who swore that the jury, a juror that being divided in their opinion, tossed up, and that the plain-having been tiff's friends won, in which was cited, Hale v. Cove, 1 Stra. divided,

Per Lord Mansfield, Ch. J. The Court cannot (a) re- and that the plaintiff ceive such an affidavit from any of the jurymen them elves, in had won, all of whom such conduct is a very high misdemeanor (b): rejected. but in every such case the Court must derive their knowledge from some other source; such as from some person having seen the transaction through a window, or by some such other

Rule refused (c).

(a) Vide Barnes, 438. 441. 4to Edition:

(b) Vide Cro. Eliz 779.

(c) 2 Lev. 205. 1 Freem. 415.

### DOE ex dem. STEWART against DENTON.

MINGAY moved for a rule to shew cause why the judgment Ejectment should not be arrested in this action.

The objection was, that this was an ejectment laid for a messuage and tenement, which he held to be a description too ge-good after neral and uncertain; and cited 1 Sid. 295. 1 Ld. Ray. 191. verdict. Copleston v. Piper.

BULLER, J. said he remembered a case where a messuage or

tenement (a) had been held sufficiently certain.

Per Guriam,

Rule refused (b).

(a) Vide Barnes, 4to Edition 173. 3 Wils. 23. & 2 Str. 891. cont.

(b) Vide 2 Stra. 834. Goodtitle against Walten.

1785.

### OXLEY against WATTS.

Trespass lies for working an estray, aithough the ing be admitted to be lawful.

THIS was an action of trespass for taking a horse, tried before Lord Mansfield, at the last Summer Assizes, at Maidstone.

The defendant, as bailiff of Lord Dartmouth, lord of the

original tak-manor of A. justified taking the said horse as an estray. Replication, that after the taking mentioned in the declara-

tion, the defendant worked the said horse, and so became a trespasser ab initio.

Erskine now moved to set aside the verdict which had been obtained by the plaintiff, on the ground that this should have been an action on the case for the consequential damage, and not an action of trespass, because the original taking was admitted to be lawful.

But per curiam, The subsequent usage is an aggravation of the trespass in taking the horse; for the using made him a trespasser ab initio (a),

Rule refused (4).

(a) Vid. Taylor v. Cole, post. 3 vol. 292. (b) 1 Salk. 221. 2 Wile. 313. 3 Wile. 20. Yelv. 96. 7. Cro. Jac. 147. Bull. N. *P*. 81.

# FITZHERBERT against MATHER.

the insurance, is bound to disclose all he knows to the underwriter, belicy is effected: and where any misrepresentation arises from

Any person THIS was an action on a policy of insurance for 110/.

acting by under-written by the defendant on the 21st of September under-written by the defendant on the 21st of September the orders of 1782, at six guineas per cent. on a cargo of oats on board the and who is ship Joseph, lost or not lost, at and from Hartland to Portsany wise in-mouth, beginning the adventure from the loading thereof on strumental in procuring board the said ship at Hartland. The defendant pleaded the general issue, and paid the premium into court. The jury found a verdict for the plaintiff at the sittings at Guidhall, before Buller, J. after last Trinity Term, subject to the opinion of the court on the following case:

"That on the 27th of July, 1782, William Bundock, of Pool, "agent for the plaintiff, contracted with Richard Thomas of fore the po- " Hartland, a corn-factor, for the purchase of 500 quarters of " oats, to be consigned to William Fuller, at Portsmouth, on the " plaintiff's account, and directed Thomas to send him (Bun-"dock) a bill of loading and invoice, and also a like bill of

his fraud or negligence, the policy is void. Where one of two innocent persons must suffer by the fraud or negligence of a third, whichever of the two gave him credit ought to bear the loss.

"loading and invoice to the plaintiff at Cuthbert Fisher's, Esq. "London. That, in pursuance thereof, Thomas shipped the "outs on board the ship insured, which sailed from Hartland FITZUER-"on the 16th of September 1782; and was lost the same day "of the pier of Hartland. That on the 16th of September MATHER. "1782, Thomas wrote the two following letters to William "Bundock and Cuthbert Fisher."

"To Mr. William Bundock.

"SIR. Hartland, Sept. 16, 1782. "This morning I loaded the Joseph with 175 quarters of " oats to the address of William Fuller, Portsmouth, and the "sloop sailed immediately: but I am afraid the wind is com-"ing to the Westward, and will force her back. I have enga-" ged Harvey, which hope will carry the rest; and if the wea-" ther does not come foul, hope to dispatch him this week. "have sent a bill of loading and a letter by the master to Mr. "Fuller; also I have sent a bill of loading and advice to Mr. "Fisher, that he may insure if he likes, as the equinox is near, " <del>&</del> &

" R. Thomas."

\* To Cuthbert Fisher, Esq. " SIR,

Hartland, Sept. 16, 1782.

" By an order from Mr. William Bundock of Pool, I shipped \* this day on board the Joseph, who immediately sailed for "Portsmouth, a cargo of oats as under; and by the same or-"der, as well as the orders of Thomas Fitzherbert, Esq. I took "the liberty of drawing on you at three days sight, in favour of Mesers. Scott and Willes, or order, 1061. 10s. to be placed "to the account of Thomas Fitzherbert, Esq. I wish the "whole safe to hand, and expect another vessel to be loaded "this week, weather permitting. This evening appears " stormy.

> " I remain, &c. " R. Thomas."

Bills of lading, £. 106 10 0

"That about six or seven o'clock of the evening of the "16th September, Richard Thomas heard a report that a ship 1785. BERT aguinet

" was on shore; and at six o'clock in the morning of the 17th, " he knew the ship was lost. That the mode of sending letters Fitzher- " from Hartland to London is as follows; the letters are collect-" ed by a privat chand, who goes with them from Hartland to " Bideford about one or two o'clock on the day the post sets "out from Bideford, and which leaves Bideford about nine " c'clock in the evening. That the 16th of September was not " a post-day, and the above letters did not leave Hartland till " one o'clock in the afternoon on the 17th, which was the post-"day from Bideford to London; and the letters which went " from Bideford by the post of that evening, were, receiv-"ed in London on the 20th of September. That on the 19th " the plaintiff wrote the following letter to Cuthbert Fisher, " Esq.

Stubb Lodge, near Portsmouth, Sept. 19, 1782.

" Dear Fisher, " My correspondent, Mr. William Bundock of Pool having " informed me he has sent two sloops to Hartland, in Deven-" shire, to load oats on my account and risk, I begthe favour " of you to insure my amount of the cargoes to Portsmouth, " as soon as the bills are sent you. T. Fitzherbert."

"That the last mentioned letter, together with the aforesaid "letter, from R. Thomas to Mr. Fisher, dated the 16th of " September, were both received by Fisher in London on the "20th of September, and he thereupon directed the insurance " in question to be effected. That on the 21st of September, " the defendant under-wrote the policy stated in the declara-"tion. If the court should be of opinion that the plaintiff "may recover, then the verdict to stand; if not, then a ver-" dict for the defendant."

Bower for the plaintiff made two questions:

1st, Supposing Thomas to be the agent of the plaintiff, whether his negligence, in not sending an account of the loss of the ship, shall vacate the policy?

The whole that is required in making these kind of contracts is, that they be made bona fide between the insured and the insurer. If there be a real disclosure as between them, the act of a third person is not material (a).

2dly, Whether Thomas be the plaintiff's agent? All the orders which Bundock had given to Thomas were to send such a quantity of oats on board a ship, and to send a bill of lading:

the moment he had done that, his agency ceased.

Cowper,

(a) 5 Burr. 2084.

Couper, for the defendant, contended that Thomas was the plaintif's agent. Thomas suffered a letter to go to Fisher, informing him that the ship sailed several hours after he knew she was lost; he himself knowing an insurance might be made, s appears by his letter dated the same day to Bundock. The MATHER kuer having been written before the loss was known makes no difference, because it did not go before Thomas actually new of the loss. If there had been no reference to Thome's letter, there could have been no insurance: this connects him with the principal. The case of Stewart v. Dunlop, in the House of Lords in 1785, on an appeal from the sessions of kallend, is very strong. That was where a clerk of the assured, knowing of the loss of the ship, suffered the merchant to cause a policy to be made, without disclosing what he knew; on which ground the policy was vacated (a).

Lord MANSFIELD, Ch. J. This policy was effected by misrepresentation: and that misrepresentation arose from the proper agent of the plaintiff, who gave the intelligence. Now whether this happened by fraud or negligence, it makes no dif-

hence; for in either case the policy is void.

It was by misrepresentation; because the under-writer was ruranted, on the information of the agent, to take for granted, that on the 7th Sept. at 12 or 1 o'clock, the ship was safe; for the agent gave an account of the ship being loaded, and and nothing of what had happened to her. Then there was arong ground to believe on this letter, that she was safe when

he post came away.

How did this misrepresentation happen? The agent wrote the letter. And supposing he was not an agent, he gave information to Fisher, as well as to the plaintiff, to make the inmance. He acted honestly when he wrote the letter; but on the 16th at night he heard the ship was on shore, and the next noming he knew that she was lost. The post did not go out ill the afternoon of that day; therefore he had full opportumity to send an account of the loss.

If Thomas were not guilty of fraud, at least he was guilty of great negligence; and this policy, being effected by misre-

resentation, is void.

WILLES,

<sup>(</sup>a) Quee? Whether that case might not have been determined on the preption that the principal himself knew of the loss before the policy was

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WILLES, J. Thomas must be considered as the agent of the plaintiff. He shows by his first letter that he acted by the orders of Bundock, as well as of the plaintiff; and being he agent, the plaintiff must be liable for any misrepresentation of Thomas; and this is a gross misrepresentation.

ASHHURST, J. On general principles of policy, the act of the agent ought to bind the principal (a); because it must be taken for granted, that the principal knows whatever the ager knows. And there is no hardship on the plaintiff: for if the fact had been known, the policy could not have been effected

BULLER, J. In order to shew that Thomas was not the agent for the plaintiff, Mr. Bower assumed one fact which is contrary to the case; for he said the insurance was not mad in consequence of Thomas's letter: but the fact is not so. According to the plaintiff's letter, the insurance was not to be made till Thomas's letter arrived: and the plaintiff expressing refers to the letter of Thomas, "when it shall arrive;" it was therefore the foundation of the insurance.

Though the plaintiff be innocent, yet if he build his information on that of his agent, and his agent be guilty of a mix representation, the principal must suffer. It is the commo question every day at Guildhall, when one of two innocent persons must suffer by the fraud or negligence of a third, which of the two gave credit? Here it appears that the plaintitusted Thomas; and he must therefore take the consequences Judgment for the defendant.

(a) Vid. Doe v. Marsin, post. 4 vol. 39.

#### MINNS against BAXTER.

The defendant is bound by Shepherd last Trinity Term, calling on the office, whether the plaintiff has brought in a four-day rule to bring in the issue roll, before he signs judgment of

non pros, even though he may have searched on the expiration of the rule to bring in the rol

office, and the roll not being then brought in, signed judgment of non pros the next day at twelve. This practice Baldwin

contended was regular.

Shepherd, contra. As in fact the judgment was not signed till after the roll was actually brought in the next morning, on the 15th, it was then irregular to sign judgment without making another search. He contended that this was not like a case where a party puts himself in contempt; as for instance, where an attachment is moved against him; because there the person moving for such attachment being once entifled to it, does not wave his right, by omitting to take advantage of it on the very day. But it is like the case of a plea where, if it be not put in on the day the rule expires, and the other party does not take advantage of it immediately, he may deliver his plea any time before judgment is actually signed against him; and

The Court was of that opinion. And it appearing that the plaintiff's attorney had told the defendant's attorney of the irregularity, and had desired the matter might be rectified, without its being brought before the Court, but that he had refused, the Court made the

Rule absolute with costs (a).

(a) Vide Thompson v. Ryall, post. 4 vol. 195.

# BROOKS and another against SAMUEL and EDWARD LLOYD.

COWPER had moved for a rule to shew cause why the writ A surety is of fieri facias, issued and executed in this cause, should within the not be set aside, upon the ground that the bond upon which the meaning of the set action is brought might have been proved under a 7 Ges. 1. c. commission of bankrupt which had issued against the second 31. of these defendants, who had obtained his certificate.

The facts were, Samuel Lloyd, being indebted in \$41. for goods sold and delivered by the plaintiff, was arrested for the same; and in order to procure his discharge, prevailed on Edward Lloyd to become surety with him in a bond given to the plaintiff, bearing date the 27th September 1784, which was payable by instalments; and before the first default, the defendant, Edward Lloyd, became a bankrupt, and a commission issued, under which the defendant neglected to prove his debt.

Russel against the rule contended, that the certificate in this case could not be a bar, because the money due on the bond Vol. I.

D

MINNS against BAXTER

1785. Be OKS against LLOYD. not being pavable till after the issuing of the commission, the debt could not be proved under it, unless by the statute 7 Geo. 1. c. 31. and that this was not a bond within that statute. The credit was not originally given on the bond; it had been given before. That statute was made for the encouragement of trade: here the business, as far as trade was concerned, was complete long before the bond was given. It was not the buyer of the goods who became bankrupt, which, by the preamble of the statute (a), appears to have been the case provided for. To be within the statute also the security should be given at the time of the sale of the goods, that it may appear that they were sold on that security; or, at least, if given afterwards it should be given by the buyer of the goods. Here it was neither given at the time, nor by the buyer, but by another person as security, and therefore not within the statute. And he cited Alsop and another v. Price. Dougl. 155.

Lord MANSFIELD, Ch. J. They are both principals, and both are liable: the credit was given to the defendant Edward Lloyd as well as to Samuel Lloyd. And, as under the statute, the plaintiffs could have proved the bond under the commission,

and they neglected to do it,

The rule must be made absolute.

(a) Vide Swaine v. De Matter, 2 Stra. 1211.

## SUTTON against MITCHELL.

The owner of a ship is not liable beyond the ship and freight, under 7 Geo. 2. c 15 in robbery, in which one of the mariners is concerned, by giving intelligence, and afterwards sharing the spoil.

HIS was in the nature of an action against a common carrier, and it was brought to recover the value of a large quantity of dollars, shipped by the plaintiff, on board value of the the ship Elbe, bound from London for Hamburgh, in the month of October 1784, which, during the night, were taken by force from on board the ship by a number of fresh-water pirates, as she lay at anchor in the Thames. At the trial at Guildhell, at the case of a the sittings after Trinity Term last, before Lord Mansfeld, the defendant's counsel rested his defence upon the first part of the first section of the 7 Geo. 2. c. 15. which enacts, "that " no person or persons, who is, are, or shall be, owner or owners " of any ship or vessel, shall be subject or liable to answer for, " or make good to any one or more person or persons, any " loss or damage by reason of any embezzlement, secreting, or " making away with, by the master or mariners, or any of " them, of any gold, silver, diamonds, jewels, precious stones, " or other goods or merchandize, which from and after the " 24th "24th June 1734, shall be shipped, taken in, or put on board any ship or vessel, beyond the value of the ship and freight." And evidence was offered to prove, that one of the mariners was accessary in the robbery by giving intelligence. But Lord Mansfield was then of opinion, that the word embizzlement was not broad enough to cover this transaction, and therefore he directed the jury to find for the plaintiff to the whole amount of the dollars.

SUTTON against MITCH-

The motion for a new trial, by Mingay, was founded on the latter part of the same section in the act, the words of which are more general, and comprehend, "any act, matter, or thing, "damage, or forfeiture, done, occasioned, or incurred, from and after the said 24th June 1734, by the said master or mariners, or any of them, without the privity or knowledge of such owner or owners, further than the value of the ship or vessel, with all her appurtenances, and the full amount of the freight due, or to grow due, for and during the voyage, "Ec."

Bearcroft, Lee, and Baldwin, for the plaintiff, took notice that this motion was founded on an affidavit that one of the mariners had informed one of the robbers, that if he would give him a share, he would inform him of the day on which the money was to be sent on board, and where it was placed, and that the same mariner afterwards shared the spoil. is no doubt but that the owners of a ship are liable for the full amount of every loss by robbery; and the only question here is upon the 7 Geo. 2. which says, that the owners shall not be liable for more than the value of the ship and freight, in any case of embezzlement by the master or mariners; but in order to exculpate the owner, it should appear that one of the mariners was actually concerned in the robbery. Now, does this motion state a case in which he could be prosecuted as a party? For it does not follow that because one tells another where a treasure is to be found, that a felony must be committed: and if he is to be taken as one of the actors in point of law the consequence must be, he is guilty of felony; and then you must shew that he is guilty of felony on the affidavits. Here he does not appear to be a principal in the robbery; he is only an accessary after the fact, by receiving part of the goods stolen. As to the word "occasioned," it relates only to forfeiture. The words of the act exclude all idea of force: but this is expressly admitted to have been done by force. And it is laid, down by Foster, that a person who is charged with privately stealing must be acquitted, if there be any evidence of force being used.

Mingay,

1785. SUTTON againet Micth-

ELL.

Mingay, in support of the rule, relied on the latter part of the section above mentioned.

Lord Mansfield, Ch. J. The act of parliament is certainly large enough to take in this matter. I decided it before on the first part of the section: the latter part was not relied on, or even mentioned at the trial.

Willes, and Ashhurst, Justices, concurred.

Buller, I. This act is as strong as possible, and was meant to protect the owner against all treachery in the master or mariners, as appears from the clause in question as well as the preamble of the act. It meant to relieve the owners of ships from hardships, and to encourage them; at the same time saying, that so far as you have trusted the master and mariners yourself, so far you shall be answerable; which is to the value of the ship and freight.

This man is an accessary both before and after the fact. the argument for the plaintiff holds, it would confine it to the act of the mariner only: but suppose a mariner combined with three or four other persons, there could be no doubt but that that would come within the provision of the statute.

Rule made absolute.

N. B. The rule was made absolute on payment of costs. because this motion was made on a new ground, not opened before on the trial.

STOKES and another, OVERSEERS of St. VEDAST'S. otherwise FOSTER, against LEWIS and another OVER-SEERS of St. MICHAEL LE QUERN.

Assumpait -for money paid, laid out, and expended, will not lie when the money has been paid against the cecpress consent of the party for maid.

THIS was an action for money paid, laid out, and expended, by the plaintiffs to the use of the defendants. The question arose upon the payment of a sexton's salary. At the trial which came on before Lord Mansfield at the last sittings in London, it appeared, that by the act 22 & 23 Car. 2. c. 11. which was an additional act for rebuilding the city of London after the great fire, and uniting parishes, &c. amongst others the parishes of St. Vedast's and St. Michael le Quern were united; and that since that time, one set of officers had whose use it served for the two parishes, the election of whom had always is supposed been made at a joint vestry. That only nine vacancies in the to have been office of sexton had happened since, all of which had been filled up

up agreeably to this custom. That in the year 1759, the sexton's salary was fixed at 201. per annum, which was agreed to be paid equally by both parishes. That the overseers of St. Wedast's had paid the sexton, who was last chosen, the whole sum; to recover a moiety of which this action was brought.

STOKES against Lewis

The defence set up was, that the last election of a sexton ras not a joint one; and that the parish of St. Michael claimed a right of choosing a separate sexton for themselves, of thich they had given notice to the other parish.

Lord Mansfield at the trial, being of opinion that this action

dd not lie, nonsuited the plaintiffs.

Erskine, Mingay, and Law, shewed cause against a moon which Sir Thomas Davenport had made for a new trial.

One of the first principles of law is, that an assumpsit cancan be raised by paying the debt of another against his will. The present plaintiffs have here paid this money in their own wrong, after notice from the other parish that they meant to dispute the right, and to elect a sexton of their own. If any party was aggrieved here it was the sexton, and he might have brought his action against the parish who refused to pay their quota.

Sir Thomas Davenport, Bearcroft, and Chambre, in support of the rule, said, that they had offered to give evidence that a joint vestry did meet on the 17th February 1784, when the senon was chosen, after the notice on the 11th that the other parish would not meet. Therefore, although there was notice that they would meet, yet if they did actually meet, the Court would not consider now whether the meeting was perfectly formal and regular; that was a proper circumstance for the jury to decide. If there is a joint obligation to pay a debt, one party may pay the whole, and bring an action for the moiety, even with the dissent of the other party. Whether this was a joint obligation should also have been left to the jury.

Lord MANSFFELD, Ch. J. All the argument is beside the question. The merits of this election are not material here, and the validity of the meeting on the 17th is not to the purpose. The facts that gave rise to the question are not disputed: the dispute arises concerning the election of a sexton, and the way of trying it is by refusing to pay the sexton elected; the whole is notoriously in litigation. Under these circumstances, therefore, one parish paid the quota of the other in spite of their teeth: then can it be said, that his action for money paid, laid out and expended, will lie? Certainly not. This action must be grounded either on an express

1 Saunder 265 n.

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. . .

1785. STOKES agains Lawis:

or implied consent: here is neither. Another strong object tion to this action is, that it is trying the right of the sexto without his being a party to it.

Willes, and Ashhurst, Justices, concurred.

BULLER, J. If this were held to be a joint obligation it would be saying that the sexton might bring his actic against one of the parishes for the whole sum; which is n the case.

Rule discharged (a

Vide H. Bl. Rep. C. B. 91, 2, 3, 4.

## DELANEY and another against STODDART.

of her loading port into another port. and being there, she does the to get to her port of destination, she is not

obliged to return to the port from Neither is it a deviation if she complete her lading at the port into which she is driven. In the principal case

however,

warrant

this.

there was a custom to

If a ship be driven out
BULLER, J. reported the following facts as they appear upon the trial before him at Guildhall.

This was an action upon the case to recover a loss up the ship Friendship, which the plaintiff, who was a mercha in the West Indies, had ordered the defendant, who was I correspondent in England, to get insured "at and from . best she can " Kitts to London," and which the defendant had neglect to do.

> The following extracts from letters were read in evidence From the plaintiff to the defendant, dated St. Kitts, 30 April 1781, saying "he should purchase a ship, and offeri " the defendant a share."

From the plaintiff to the defendant, dated St. Kitta, 4 whence she May 1781, saying, "he had purchased the ship, but had or was driven. " a share in it himself; the residue being divided into the " or four more shares, one of which he had reserved for t "defendant, in case he would wish to be congerned; and "recting an insurance upon the ship "at and from St. Ki " to London,' warranted to sail with convoy."

> From the plaintiff to the defendant, 14th June 1781, Kitts, " the ship is loaden and will sail on or before the fi " of August; you will therefore have the insurance prepare

" She is called the Friendship."

From the defendant to the plaintiff, London, 28th June 17 " If you purchase the ship you mention, I have no object " to have a fourth, or a share equal to yours."

From the plaintiff to the defendant, St. Kitte, Bdi: F "I now inform you that the ship left port to take "her cargo. She let go an anchor at Sandy Point subut

"the wind blew fresh, she drove out and could not come in "again: she was obliged to go to St. Eustatia; I hope you where not neglected to make the insurance for fear of acci. DELANEY a dents."

STOPPART.

From the defendant to the plaintiff, London, 19th July 1781. "The insurance you ordered shall be done; but though you mentioned the ship being ready for sailing, you do not men-"tion her name, nor whether I am a part owner; so that I am "entirely in the dark."

From the plaintiff to the defendant, St. Kitts, 25th July 1781 (received in London on the 14th September 1781.)

" As the ship Friendship did all in her power to get up from "St. Eustatia but could not, therefore I thought proper to sell ber, which I did to Mr. Ross of St. Eustatia. I hope the "insurers will not insist on the premium; therefore hope you will withdraw the insurance, as I suppose the insurers will "not be liable."

From the plaintiff to the defendant, St. Kitts, 26th July 1781 (received in London on the 11th September 1781.) "Mr. "Ross has purchased the ship Friendship, which you are directed to insure from St. Eustatia to London; but if the for-"mer insurers will not give up the premium, you may assign "my interest in that insurance over to Mr. Ross."

About the beginning of September, hefore the arrival of he two last letters, the defendant had gone into the counmy, and had left word with his clerk to open all letters. These etters were sent after him into the country, and the defendant did not receive them in fact till the 24th September.

From the defendant to the plaintiff, London, August 1st, 1781. "I shall make the insurance; I have already wrote you, "that I shall cheerfully take part in the ship Friendship."

Entry in the defendant's book, 2d August 1781.

"Owners of ship Friendship debtors for insurance on "ship and freight, from St. Kitts to London, warrant-"ed to depart with convoy on or before the first August, " at 12 per cent."

While the defendant was in the country, Ross's agent enquited at the defendant's to know whether the insurance ad been effected, and was told by the clerk, that he beleved it was. The premium was then as high as 40 guion ships in the same fleet, and the defendant, immedately upon coming to town, cancelled the insurance in 1785. his books; but the news of the loss had arrived at Lloyd's several hours before that time.

DELANEY

against

STODDART.

It also appeared that the ship Friendship had sailed the first of August from St. Eustatia with the convoy, and that she had afterwards foundered at sea. That St. Eustatia is in the direct road to London from St. Kitts, and the convoy from St. Kitts always looked into St. Eustatia, to take up any ships that might be there. That if the Friendship had sailed from St. Kitts, she must have gone by St. Eustatia, but would not have stopped there. That when she was driven to St. Eustatia, after making several efforts to get back to St. Kitts to finish her loading, and finding she could not succeed, she then took in the rest of her loading at St. Eustatia.

Mr. J. BULLER then took notice that four points had been

made at the trial.

1st, That supposing the plaintiff had a right to recover any thing it could not be the whole, as the defendant had taken a fourth part; but the answer he had given it at Guildhall was, that the argument did not hold with regard to Ross, who had purchased the whole.

2dly, Whether the defendant had actually accepted the in-

surance? He had do doubt upon that point also.

3dly, Whether on account of the letter of the 25th July 1781, the defendant had not a right to retract the insurance? He was of opinion, that whether the defendant had a right or not, he did not do it in fact, till it was too late.

4thly, Which was the great point of doubt whether there

had been a deviation.

The jury found a verdict for the plaintiffs, 1500l. damages.

After argument by counsel,

Lord Mansfield, Ch. J. The only question is, whether this is the same voyage as that intended to be insured. As to the other points, the defendant acted wrong in not obeying the orders of his correspondent. He acted under a mask; he ought to have made the policy, and he told his correspondent that he had insured, whereas it was only an insurance of his own, by an entry in his books; and as to his concealing it, there is no colour for maintaining it. With regard to the question about a fourth of the ship, it is very doubtful whether the defendant accepted it: no money was paid by him, and if he had a right to a fourth, this verdict would not preclude him; but it appeared that he entered the premium for the whole in his books.

The

1785.

The great question is, whether there was a deviation? and

that depends on the evidence.

they have determined it.

If a storm drive a ship out of her voyage into any port, against and being there, she does the best she can to get to her port of destination, she is not obliged to return back to the point from whence she was driven: but here the witnesses say, she tried to get back to St. Kitts, and could not; and it is a much easier navigation to go directly from St. Eustatia to London, than to go back to St. Kitts first. And as to the taking in the carge at St. Eustatia, I do not find that the ship lost any time by it. Every thing should be imputed to the storm which was in reality done and occasioned by it. This is the only point on which I had any doubt; and it required some consideration. It was a question which was proper to be left to a jury, whether this was the same voyage or not; and

WILLES, J. My only doubt is, whether this was the same voyage insured. So far as the ship was driven by stress of weather, so far there is an exception. When she was driven to St. Eustatia, she attempted to get back to St. Kitts; but I do not find that she made any attempt to get to London at that time. When she was at St. Eustatia, the owner of the ship sold her to Ress, who loaded her afresh with tobacco instead of sugar, which was to have been her original cargo; so that there was a new cargo, a new owner, and a new voyage. In these cases we lean very much to deviation. In a case (a) lately determined in this Court it was held, that going to Beaumaris, though only a few leagues out of the way, was a deviation. It strikes me as a case of some difficulty: perhaps the jury had not enough evidence laid before them to determine upon; for there is nothing said on the part of the defendant as to the usual course of the voyage. The risk was certainly increased by the ship's continuing at St. Eustatia so long; for the insurance, if good at all, was good all the time she lay by at St. Eustatia, and she might have continued there much longer. In my opinion, it is very well worth the re-consideration of a jury.

ASHHURST, J. This ought to be considered as the same voyage insured. Wherever a ship is driven by stress of weather out of her own port into another, that shall not be considered as a deviation. Here the ship was forced by stress of weather to go to St. Eustatia, and being there, she endeavoured several times to get back to St. Kitts, but without effect. In fact it was better for the parties that the cargo should be completed at St. Eustatia. Her continuing

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(a) Hibbert and others assignees of Barber v. Phyn.

at St. Eustatia rather diminished the risk than otherwise; because, if she had gone back to St. Kitts, it would have table that ken up a longer time. If then every thing was done that could be done under such circumstances for the benefit of the adventure, this shall not vacate the policy.

As to the other point concerning the interest of the parties, this is not the plaintiff's action: it is the action of Ross. A policy certainly must be transferred: for though a chose in action cannot in law be assigned, yet in equity it may; therefore we will permit the action to be brought by trustees. There was an agreement between the plaintiff and Ross, that the policy should be transferred, because Ross's agent enquired whether the insurance had been effected; and I think the plaintiff had interest enough to found the action upon (a).

BULLER, J. It has been much relied on in this case, that there was a change of property; but that, in my opinion, makes no difference. Then laying that out of the question and supposing the ship as not being sold to Ross, I will first consider whether this is a different voyage. But that cannot be, as it would be contrary to the evidence. Neither is it true that the vessel afterwards pursued the same voyage by accident; for that part of the cargo which she took in at St. Kitts continued on board her the whole time, and the original intention of the ship's coming to London was likewise continued: the parties never thought of a different voyage. But it is said, that she took in another cargo at St. Eustatia. What says the evidence? Where a captain has not taken in a full cargo at St. Kitts, it is usual to take in the rest at St. Eustatia; such was proved to be the custom of the voyage; and it was proved that on a voluntary act of the captain's going to St. Eustatia, the policy would have protected the ship during her stay there; a fortiori will it, where the ship was driven there by stress of weather. As to the defendant's not being prepared at the trial to answer the usage, he ought to have come prepared for that which was the gist of his de-Then was the risk altered? had it been so, it was in the defendant's power to have proved it; but there was no proof that it was altered. Part of the same cargo continued; nor does it appear that they meant to alter the cargo; for she endeavoured to get back to St. Kitts to take in the rest, but was prevented by storms. I think the risk would in reality have been much greater, if she had gone back; for she must have come by the way of St. Eustaka again in her passage home. The part of the cargo which was taken in at the time the ship was driven from St. Kitts had been al read

ready paid for by the defendant: even this would not have 1785. been paid for by the defendant, if he had conceived that the voyage had been at an end. Another circumstance is very DELANSY strong; all the other policies on the same voyage have been against STODDART. paid. With regard to the fourth share, there is no question on it, for the policy is to be considered as for the benefit of Ross; and he recovers nothing more than he has lost. Even if it had not been assigned, it would have been the same thing: for supposing the defendant to have taken the fourth part, still he was indebted to the plaintiff for it; and if the plaintiff recover only three fourths in this action, he may recover the remaining part in an action for goods sold and delirered: but it appears to be very doubtful on the letter, whether he had accepted the fourth part or not. As to the policy being subsequently cancelled, it does not appear; for there must be some act done before the loss is known to signify such cancelling; and if no act be done, things must be taken to remain as they were. On all points I think the verdict is. right.

Rule discharged.

## FORWARD against PITTARD.

THIS was an action on the case against the defendant as A carrier a common carrier, for not safely carrying and deliver- who undering the plaintiff's goods. This action was tried at the last takes for Summer Assizes at Dorchester, before Mr. Baron Perryn, ry goods, is when the jury found a verdict for the plaintiff, subject to the bound to deopinion of the Court on the following case: "That the defendant was a common carrier from London at all events, to Shafinkary. That on Thursday the 14th of Out has 1704 " to Shaftsbury. That on Thursday the 14th of October 1784, maged of "the plaintiff delivered to him on Weyhill 12 pockets of desirozed by "hops to be carried by him to Andover, and to be by him the act of forwarded to Shaftsbury by his public road waggon, which King's ene-" travels from London through Andover to Shaftsbury. That, mies-even "by the course of travelling, such waggon was not to leave though the "Andover till the Saturday evening following. That in the jury exinght of the following day after the delivery of the hops, that they "a fire broke out in a booth at the distance of 100 yards from were de-"the booth in which the defendant had deposited the hops, stroyed without any which burnt for some time with unextinguishable violence, actual negli-"and during that time communicated itself to the said booth gence in the "in which the defendant had deposited the hops, and entirely uefendant.
"consumed them without any actual negligence in the defend. A carrier is in the nature of an ture of an ture of an

N. Bond insurer.

against PITTARD.

N. Bond for the plaintiff. The question is, whether a carrier is liable for the loss of goods occasioned by fire, without FORWARD any negligence in him or his servants. The general proposition is, that a carrier is liable in all cases, except the loss be occasioned by the act of God, or the King's enemies (a). And this doctrine has lately been recognized by this Court, in the case of the Company of the Trent Navigation v. Wood The only doubt is on the construction of the words "the act of God." It is an effect immediately produced without the interposition of any human cause. In Amies and Stephens (c), these words were held to include the case of a ship being lost by tempest. In the books, under the head of "waste," there is an analogous distinction to be found: if a house fall down by tempest, or be burned by lightning, it is no waste; but burning by negligence or mischance is waste (d).

Before the 6th of Anne (e) an action lay against any person in whose house a fire accidentally began: this shews that an accidental fire was not in law considered as the act of God; but the person was punishable for negligence. Suppose a fire happens in a house where there are different lodgers, each of whose lodgings is considered as a separate house: if the fire be communicated from one lodging to another, and the Court say the first fire was the act of man, at what time will it be said that it ceases to be the act of man and commences to be the act of God? if it were not the act of man in the first house, it is impossible to draw the line. In the case of the Company of the Trent Navigation and Wood, Lord Mansfield said, " By the act of God is meant a natural, " not merely an inevitable, accident."

If it be contended for the defendant, that it is here stated that there was no actual negligence, that will not serve him; for this action was not founded in negligence. Lord Holt says, there are several species of bailments, and different degrees of liability annexed to each: and a carrier is that kind of bailee, who is answerable though there be no actual negli-

gence.

Borough, for the defendant, observed that the point in this case was not before the Court in any of the cases cited. The general question here is, whether a carrier is compellable to make satisfaction for goods delivered to him to carry, and destroyed by mere accident, in a case where negligence is so far from being imputed to him, that it is expressly negatived? This action of assumpsit must be considered as an action founded on what is called the custom of the realm relating to

<sup>(</sup>a) Lord Raymond, 909. 1 Wile. 281 (b) East. 25 Geo. 3. B. R. (e) 6 Ann. c. 31. 10 Ann. c. 14. (c) 1 Stra. 128. (d) Co. Lit. 53. a. b.

carriers. 'And from a review of all the cases on this subject it manifestly appears that a carrier is only liable for damage and loss occasioned by the acts or negligence of himself and FORWARD servants, that is, for such damage and loss only as human care PITTARD. or foresight can prevent; and that there is no implied contract between him and his employers to indemnify them against unavoidable accidents. The law with respect to land carriers and water carriers is the same. Rich v. Kneeland, Cre. Jac. 330. Hob. 17. 5 Burr. 2827.

In Vid. 27. The declaration, in an action against a waterman for negligently keeping his goods, states the custom relative to carriers thus, "absque substractione, amissione, seu " spoliatione, portare tenenter, ita quod pro defectu dictorum "communium portatorum seu servientium suorum, hujusmodi " bona et catalla eis sic ut prefertur deliberata, non sint perdita, "amissa, seu spoliata." It then states the breach, that the defendant had not delivered them, and " pro defectu bonæ cus-"todia ipsius defendentis et servientium suorum perdita et amis-"sa fuerunt." In Brown!. Red. 12. the breach in a declaration against a carrier is, "defendens tam negligenter et impro-"vide custodivit et carriavit, &c. In Clift. 38, 39. Mod. Intr. 91, 92, and Herne 76, the entries are to the same effect. In Rich and Kneeland (a), the custom is stated in a similar way: and in the Exchequer Chamber it was resolved, "that though "it was laid as a custom of the realm, yet indeed it is common " law." On considering these cases, it is not true that " the "act of God, and of the King's enemies," is an exception from the law. For an exception is always of something comprehended within the rule, and therefore excepted out of it: but the act of God and of the King's enemies is not within the law as laid down in the books cited.

All the authorities cited by the counsel for the plaintiff are founded on the dictum in Coggs v. Bernard (b), where this doctrine was first laid down: but Lord Holt did not mean to state the proposition in the sense in which it has been contended he did state it. He did not intend to say, that cases falling within the reasoning of what are vulgarly called "acts "of God," should not also be good defences for a carrier. After saying (c) " the law charges the persons, thus entrust-"ed to carry goods, against all events, but the acts of God "and of the enemies of the King," he proceeds thus, "for "though the force be never so great, as if an irresistible "multitude of people should rob him, nevertheless he is "chargeable. And this is a politic establishment, contrived

(a) Hob. 17. (b) 2 Lord Raymond 909. (c) Lord Raymond 918.

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"by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons who had any dealings with them, by combining with thieves, &c. and yet doing it in such a clandestine manner, as would not be possible to be discovered."

As Lord Holt therefore states the responsibility of carriers in case of robbery to take it's origin from a ground of policy, he could not mean to say, that a carrier was also liable in cases of accidents, where neither combination or negligence can possibly exist.

It appears from the Doctor and Student (a) that, at the time that book was written, the carrier was held liable for robberies which diligence and foresight might prevent. And what is there said agrees precisely with the custom; and does not bear hard on the carrier. If he will travel by night, and is robbed, he has no remedy against the hundred: for then he is not protected by the statute of Winton, and he ought to be answerable to the employer. If he travel by day and is robbed he has a remedy. Now the carrier may not perhaps be worth suing; and the employer may bring the action against the hundred in his own name; which action he would be deprived of, if the carrier travelled by night.

There is not a single authority in all the old books which says that a carrier is responsible for mere accidents. He only engages against substraction, spoil, and loss, occasioned by the neglect of himself or his servants. These words plainly point at acts to be done, and omission of care and diligence. But in the present case there is no act done; and there cannot be said to be any omission of care and diligence, since they

could not have prevented the calamity.

Lord Holt, in Coggs v. Bernard, seems to have traced, with great attention, the different species of bailments. He cites many passages from Bracton, who has nearly copied them from Justinian. So that it is probable, that the custom relating to carriers took its origin from the civil law as to bailments. Now it is observable that in no one case of bailment is the bailee answerable for an accident: he is only liable for want of diligence. The only difference in this respect between the civil and the English law is, that the former (b) distinguishes between the different degrees of diligence required in the different species of bailment; which the latter does not.

In all the cases to be found in our books, may be traced the true ground of liability, negligence. If the law were not

(a) Dial. 2, c. 38. p. 270. (b) Justin, lib. 3. 15. S. 2, 3, 4. Tit. 35. S. 5.

as is now contended for, the question of negligence could never have arisen; and the case of robbery could not have borne any argument; whereas the case of Mors v. Slue (a) came on Forward repeatedly before the court, and created very considerable doubis.

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In the case of Dale v. Hall (b), and the proprietors of the Trent Navigation v. Wood, there were clear facts of negligenee. In the first, the rats gnawed a hole in the hoy, which undoubtedly might have been prevented. And in the other, each of the judges, in giving his opinion, said there was negligence.

In the year books (c), there is a case of an action against a waterman for overloading his boat so that the plaintiff's borse was drowned. This case is recognized in Williams v. Lloyd (d), where it is said " it was there agreed that if he "had not surcharged the boat, although the horse was "drowned, no action lies, notwithstanding the assumpsit: "but if he surcharge the boat, otherwise; for there is de-"fault and negligence in the party." The court in 22 Ass. 41. said, " it seems that you trespassed when you surcharged "the boat, by which the horse perished." The same case is to be found in 1 Ro. Abr. 10 pl. 18. Bro. Tit. Action sur le And it is also recognized in Williams v. Hide and Case 78. Ux. Palm. 548.

In Winch. 26. To an action against a carrier, there is a special plea that the inn in which the goods were deposited was burned by fire, and that the plaintiff's goods were at the same time destroyed, without the default or neglect of the defendant or his servants. To this the plaintiff demurred, not generally but specially, " that the plea amounted to the " general issue."

In all actions founded in negligence, the negligence is alledged and tried, as a fuct; as in actions against a farrier, smith, coachman, &c. It is the constant course in such actions to leave the question of negligence to the jury. It appears in Dalston v. Janson (e), that the defendant formerly used to plead particularly to the neglect. In 43 Edw. 3. 33. Clerk's Assist. 99. Mod. Intr. 95. and Brown. Red. 101. which were actions founded in negligence, the negligence is traversed. Now a traverse can be only of matter of fact. And here negligence is expressly negatived by the case.

However, if the court should be of opinion, that the carner is answerable for every loss, unless occasioned by the act of God, or the King's enemies, he then contended that, as the act of God was a good ground of defence, this accident though not within the words, was within the reason, of that ground.

(a) 1 Veut. 190. 238. (d) S. W. Jones, 180, (b) 1 Wile. 281. (e) 5 Mod. 90,

(c) 22 Azz. 41.

against PITTARD.

ground. It cannot be said that misfortunes occasioned by lightning, rain, wind, &c. are the immediate acts of the FORWARD Almighty: they are permitted but not directed by him. The reason why these accidents are not held to charge a carrier, is, that they are not under the control of the contracting party; and therefore cannot affect the contract, inasmuch as he engages only against those events, which by possibility he may prevent. Lord Bacon, in his Law Tracts, commenting on this maxim, Reg. 5. necessitas inducit privilegium quoad jura privata, says, "the law charges no man with default where-"the act is compulsory and not voluntary, and where there " is not a consent and election; therefore, if either there "be an impossibility for a man to do otherwise, or so great "a perturbation of the judgment and reason, as in presump-"tion of law man's nature cannot overcome, such necessity " carrieth a privilege in itself." Necessity, he says, is of three sorts, and under the third, he adds, " If a fire be taken " in a street, I may justify pulling down the walls or house " of another man to save the row from the spreading of the " fire." Now in the present case, if any person, in order to stop the progress of the flames, had insisted on pulling down the booth wherein the hops were deposited, and in doing this the hops had been damaged, the carrier would not have been liable to make good such damage; for it would have been unlawful for him to have prevented the pulling down the

It is expressly found in the present case, that the fire burnt with unextinguishable violence. The breaking out of the fire was an event which God only could foresee. And the course it would take was as little to be discovered by human

penetration.

Bond in reply. There are several strong cases where there could not be any negligence. It is not sufficient in these cases to negative any negligence; for every thing is negligence which the law does not excuse (a). And the question here is, is this a case which the law does excuse? In Goffe v. Clinkard (cited in Wils. 282.) there was all possible care on the part of the defendants. The judgment in the case of (b) Gibbon v. Peyton and another, which was an action against a stage-coachman for not delivering money sent, is extremely strong: there Lord Mansfield said (c), " a common carrier, " in respect of the premium he is to receive, runs the risk of "them, and must make good the loss, though it happen with-"out any fault in him; the reward making him answerable " for their safe delivery."

That

(a) 1 Wile. 282.

(b) 4 Burr. 2298.

(c) 4 Burr. 2030.

That a carrier was liable in the case of a robbery was first held in 9 Ed. 4. pl. 40.

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A bailee only engages to take care of his goods as his own, FORWARD and is not answerable for a robbery; but a carrier insures. against 1 Ventr. 190. 238. Sir T. Raym. 220. S. C. 1 Mod. 85.

In Barclay and Heygena (a), which was an action against a master of a ship to recover the value of some goods put on board his ship in order to be carried to St. Sebastian; it was proved that an irresistible force broke into the ship in the river Thames, and stole the goods; yet the defendant was held answerable. In Sutton and Mitchel (b), the question was not disputed as far as to the value of the ship and freight.

There is no distinction between that case and a land carrier. And there can be no hardship in the Court's determining in favour of the plaintiff; for when the law is once known and established, the parties may contract according to the

terms which it prescribes.

As to negligence being a matter of fact; that is answered by the decision in the Company of the *Trent* Navigation

against Wood.

Lord MANSFIELD. There is a nicety of distinction between the act of God and inevitable necessity. In these cases actual negligence is not necessary to support the action. Cur. adv. vult.

Afterwards Lord Mansfield delivered the unanimous opi-

nion of the Court.

After stating the case-The question is, whether the common carrier is liable in this case of fire? It appears from all the cases for 100 years back, that there are events for which the carrier is liable independent of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law; a carrier is in the nature of an insurer. It is laid down that he is liable for every accident, except by the act of God, or the King's enemies. Now what is the act of God? I consider it to mean something in opposition to the act of man; for every thing is the act of God that happens by his permission; every thing, by his knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shews it was done by the King's enemies, or by such act as could not happen by the intervention of man, as storms, lightning, and tempests.

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(a) E. 24 G. 3. B. R. (b) At the sittings at Guildball after Tr. 25 G. 3. Vide ante, 16.

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If an armed force come to rob the carrier of the goods, he is liable: and a reason is given in the books, which is a bad one, viz. that he ought to have a sufficient force to repel it: but that would be impossible in some cases, as for instance in the riots in the year 1780. The true reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil.

In this case, it does not appear but that the fire arose from the act of some man or other. It certainly did arise from some act of man; for it is expressly stated not to have happened by lightning. The carrier therefore in this case is lia-

ble, inasmuch as he is liable for inevitable accident.

Judgment for the plaintiff (a).

(a) Vid. Garfide v, the Proprietors of the Trent Navigation, post. 4 vol. 581.

#### WELLS against PARKER in Error.

THIS was an action of trespass for seizing and taking the A person who rents a plaintiff's goods, &c. in the Court of Common Pleas. brick ground The defendant pleaded, 1st, the general issue; and 2dly, and makes bricks there. that they were taken by virtue of the statutes against bank-

on for public rupts. Replication de injuria sua propria &c.; on which issale, is sub-

sue was joined.

At the trial, which came on before Lord Loughborough, at laws. If a Guildhall, the jury found this special verdict: "That Purker man exercise " was the occupier of a certain farm, containing, among "other things, 800 acres of land in the parish of Croydon in "Surry, as tenant thereof, for a term of years not yet ex-" pired, to the Archbishop of Canterbury, at the yearly rent " of 221. 6s. 8d. That Parker the father, for more than 20 usual mode of " years before the year 1768, and long afterwards, held this enjoying that " farm. This farm descended to the son, who has renewed. produce, he "That one William Berand, for 20 years and more before "the year 1768, had rented a certain brick ground, parcel " of the said farm of the said J. Parker the father, the for-" mer tenant of the said farm, and made and sold bricks necessary in- " there. That Berand died in the year 1768; and up-"on his death, the present plaintiff, who had for some market: but " time before been in the joint occupation of the said farm " with his father, took the brick ground into his own posses-" sion; and then and there bought certain materials and ne-" cessary things belonging to the said Berand, who had also raw material " been used to make bricks; and that the said Parker con-"tinued to make bricks and tiles of the earth and clay aria-" ing

necessary mode of enjoying the land, there he is a trader.

" ing from part of the land, so used as a brick-ground, at "the time of the demise, and bought sand and fuel, which "were necessary ingredients for converting the earth and clay into bricks and tiles. And that during the time the within " named 7. Parker so made and sold bricks and tiles, he was "erecting buildings and making repairs unto the said farm, " in which a part of the bricks and tiles so made were expended. "That the said J. Parker continued to sell bricks and tiles " so made by him until the time of his absconding, That on "the 17th January, 1783, Parker absconded. That a com-" mission of bankrupt issued against him; that on the 10th " March, 1783, Parker was declared a bankrupt, &c.; that "the commissioners seized all his effects, &c.; that assig-"nees were chosen. That Wells was the messenger under " the said commission duly appointed; and that he, by order " of the assignees, seized the said goods, &c. mentioned in "the declaration, being then in the possession of the said " 7. Parker.

"If Parker be not within the statutes against bankrupts, "then they convict Wells of the trespass; but if the Court "shall be of opinion that he came within the bankrupt laws, "then a verdict for the defendant."

The Court of Common Pleas were of opinion that he was not subject to the bankrupt laws; and gave judgment for the plaintiff (a).

It was removed into the King's Bench by writ of error, and was argued last *Trinity* Term by *Morgan* for the plaintiff in error, and *Palmer* for the defendant; and this Term by *Mingay* for the plaintiff, and *Erskine* for the defendant.

Mingay for the plaintiff in error, contended that this special verdict was so ambiguous that the Court ought to send it back to be restated; for it is found "that sand and fuel "were necessary ingredients for converting the earth and "clay into bricks." But an ingredient is a thing which is mixed with the thing itself: now fire is not an ingredient. But if the Court should think the verdict sufficiently plain to ground their decision on it, then the question for their consideration would be, whether a person converting his own soil isto bricks in the manner mentioned in the verdict, be not a trader?

The law has been extended far enough in the cases of the soal and alum works. Those cases were determined on the idea that the commodities came to market exactly in the same state in which they were dug out of the earth; and could not be used in any other manner. But in this case,

(a) Coule's Bankrupt Laws. 40.

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PARKER.

the brick earth may be used in some other way; it may be turned to arable or grass land. In the case where a man made tiles in his own land, and bought lead for glazing them, he was determined by Lord Mansfield, who tried the cause at Lewes, to be a trader. In the case of Watkins against Cordel (a), which was a question whether the master of an iron foundery could be a bankrupt? Lord Mansfield said that the owner of land merely preparing the produce of it for market is not a trader, as in the case of the alum works: but where the estate is made the basis of a manufacture, as in the case of a brick-maker, that would make the owner a trader. He then cited Port v. Turton and others, assignees of Sparrow. 2 Wils. 172. Mayhew and Archer, 1 Stra. 513. 4 Burr. 2064. Bro. Abr. 313. 7 Vin. Abr. 55, s. 4. Hughes's Abr. 325. In the case of the alum works, Lord Mansfield went on the idea that lime was used only in preparing the alum, but it did not make part of the alum when carried to market for sale.

Erskine, for the defendant, submitted two propositions to the Court.

1st, That a buying and selling, in order to enjoy property in the most beneficial manner to the owner, is not a trading within the statutes; unless where such buying and selling is necessary to carry on some branch of trade and manufacture to an extensive amount, and where the court cannot but see it is done with a view to trade, and not as the means of enjoying his property more beneficially.

As a corollary to this; where it is a man's object, having a considerable estate, to enjoy it different ways, the purchase of small ingredients, (that is of a secondary kind,) whether they become component parts or not, will not make a man

a trader.

2dly, That to render a person a trader within the statutes, there must be a buying and selling: and it must further appear that the specific thing bought must be afterwards carried to market and sold, though perhaps changed in substance; and not merely buying one article to meliorate another not bought.

As to the first, on the supposition that there was no other ingredient in the bricks made by Parker; buying and selling the interest of land is not within the meaning of the Legislature; as in the case of Port v. Turton. A line must be drawn between the land-owner and the merchant. Where a merchant for the purpose of carrying on his trade buys a piece of land, the land is only an accessary: the principal, which

(a) 19 G. 2. B. R. cited in Cooke's Bankrupt Laws, 37.

which is the trade, draws the accessary after it, and the man may become a bankrupt. But where a land-owner buys some small ingredients for the purpose of enjoying his land, he is no trader; there the land is the principal, and buying the accessary only. In this case the brick ground was only a small part; there were 800 acres acres of farm land with it.

WELLS against

PARKER.

The judgment in the case Ex parte Harrison (a) in Chan-

cery is applicable throughout.

In the case of Watkins against Cordel; Watkins was a manufacturer of pig-iron; he took the land as an accessary to his manufacture; in that light the Court regarded his trading.

2dly, As to the mixture of any ingredient.

It is not stated that he made bricks of the earth and other ingredients purchased. For the sand and fuel are only necessary for converting the clay into bricks. But sand is not a necessary ingredient to make a component part of the bricks themselves. And even if any sand be mixed with the substance, that will not subject the party using it to the bankrupt laws; because it is only accessary, and a collateral thing to the clay: clay is the principal substance.

In the case of Archer and Mayhew the extent of the sale

was material.

Where a man has orchards and makes cyder from the produce of them, though he mix other ingredients with his apples, he cannot be liable to the bankrupt laws. So if a man make cheese, and buy salt and runnet, which are necessary to make it, he is no trader.

In the case of Dally v. Smith (b) the Court said, the bank-

rupt laws should not be extended too far.

A merchant taylor who buys cloth, and all the other materials, may become a bankrupt on account of his extensive credit: but a common working taylor, who buys no materials, cannot; because the principal part of his trade is not

baying. Vide 1 Salk. 109.

Mingay in reply. This man may be said to have bought the earth of which the bricks were made. It is not like a common field which remains after the use of it; but this is consumed in the use of it, and therefore he actually buys it. The word "ingredient" must mean a component part of the substance when made; for if it do not enter into the composition, it is no ingredient.

Lord

(a) Brown's Cases in Chan. 173.

(b) 4 Burr. 2148.

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against
PARKES.

Lord Mansfield said, on this argument,—My great difficulty is how to distinguish the law from the fact. I see from the argument and the judgment delivered by Lord Loughborough in the Common Pleas, the idea is, that if this trade be carried on as the mode of enjoying the land, he is not subject to the bankrupt laws: but if the land be taken as the means of carrying on trade, or for the purposes of manufacture, then he may be a bankrupt.

Cur. adv. milt.

Lord Mansfield now delivered the opinion of the Court. After stating the facts, he said he should make two questions:

1st, Whether, on this verdict, William Berand was to be considered as a trader within the statutes?

2dly, If William Berand were a trader, whether on this verdict the case of the plaintiff can be distinguished, so as to make him no trader?

As to the first: Brick-making for sale, abstractedly considered, is in fact carrying on a trade, and seeking to live by the profits. Many things are necessary to be bought, which can only be paid for by the sale of the bricks. The credit is given to no visible fund, but merely on the speculation of the profits expected to arise from the sale of the bricks.

But the objection is, that William Berand rented the brickground, and consequently that the bricks were the produce of his own land.

From the authorities that have been cited, and the reason of the thing, I take the true distinction to be this: If a man exercise a manufacture from the produce of his own land, as a necessary or usual mode of reaping or enjoying that produce. and bringing it advantageously to market, he shall not be considered as a trader, though he buy the necessary ingredients and materials to fit it for market; as in the case of a farmer. who makes cheese on his own land, and who buys tunnet and salt; or as in a case mentioned at the bar, where a man makes his own apples into cyder, though there be an expence attend. ing the operation, and though many things are to be bought. and some mixture, yet he is no trader; for it is the usual mode of enjoying land in the cycler counties. So in the alum works, as determined, where the operation was proved to be the necessary and constant mode practised by the proprietors of alum works. Or like the case of the coal mines, where raising them out of the pit is as necessary to the enjoyment of the land, as threshing corn, &c.

But

But where the produce of the land is merely the raw material of a manufacture and used as such, and not according to themal mode of enjoying the land; in short, where the produce of the land is an insignificant article in comparison of the whole expense of the manufacture, there he ought to be considered as a trader.

WELLS Against PARKER.

As this distinction turns on the nature and manner of exercising the manufacture, and the motive with which it is carried on, it depends so much on the light in which the jury see the transaction, and the law and the fact are so blended together, that it is hardly possible to distinguish them. And agreeably to Mr. J. Buller's direction in the case Exparte Harrison, when this cause came on before me at Croydom, I directed the jury that if they thought that Parker made bricks for his own consumption, though he sold the surplus, they ought not to find him a trader: but if they thought he carried on the trade for public sale, then they should find him a trader. And the jury upon that trial (a) found him a trader.

In this case William Berand took the brick ground with a view and for the purpose of making bricks, and carrying on the trade for public sale. The land produced nothing. The lease was merely a purchase of the clay, the same as if he had bought it at so much per load. He had nothing to do as a farmer; his sole object was making bricks for sale. Therefore we think William Berand ought to be considered as a trader.

2dly, If Berand were a trader, then whether the plaintiff's

case can be distinguished from his?

In 1768, on Berand's death, the plaintiff took possession of the brick ground. He paid for the stock; he carried on betrade in like manner; he made bricks for public sale; he ared with his father, and had a joint occupation of his farm with the father, who was lessee, and who suffered the plaintiff to take the brick ground solely. The father had no concern with the brick ground; was liable to none of the son's debts on that account; and therefore the farm was as distinct from the brick ground then, as when Berand had it. The plaintiff had no interest in the farm till 1780, when it devolved on him. But from the year 1768 he was permitted by his father, on Berand's death, to come in his place, and to carry on the trade of brick-making for sale, as Berand had done for many years. The lease in 1780 was immaterial: if he traded from 1768 till then, it was sufficient; for during that time he occupied only the brick ground, and made and sold bricks

<sup>(</sup>a) This cause was tried the first time before Lord Mansfield at Croydon.

1785. WELLS ogainst PARKER. for public sale. The plaintiff acted as Berand had done. Berand rented the brick ground as a mode of buying the clay. And whether the plaintiff rented the clay, or had it by gift from his father, it makes no difference: on this verdict he must be considered as a trader.

Judgment reversed (a).

(a) Vide poet, 783.

### TRUEMAN against HURST.

Assumbsit on 20 acdoes not lie against an infant.

A CTION of assumpsit. The first count in the declara-tion was on a promissory note for 101. given by the decount stated fendant to the plaintiff for board and lodging, and for teaching and instructing the defendant in the business of hairdressing. There were other counts for meat, drink, washing, lodging, and other necessary things; for work and labour; money paid, laid out, and expended; and on an account stated.

Plea, infancy.

Replication, for necessaries. To this there was a general

demurrer and joinder in demurrer.

Marshall for the defendant, before he took his exceptions, premised 1st, That, in replying to a plea of infancy, the plaintiff must shew enough in the replication to maintain every part of the declaration. Ellis v. Ellis, 5 Mod. 368. That if a replication, which is entire, be bad as to part, it is bad as to the whole. Webber v. Tivill, 2 Saund, 124.

The plaintiff, in his replication, has not maintained his declaration in every count; for it is open to three objections.

1st, An infant cannot bind himself by a promissory note, even for necessaries.

2dly, There is no good consideration for this note; or for the promises in the 4th and 5th counts, which were for work and labour.

3dly, An infant is not liable to an action of assumpsit on an account stated.

As to the first: An action does not lie against an infant on a promissory note: if that be the case, this note being expressed to be given for the consideration therein mentioned makes no difference. In an action on a promissory note between the original parties, the consideration may be enquired into: but when it passes into the hands of third persons, it cannot. Now this is declared upon as a negotiable note. The same reason, which holds that an infant cannot bind himself in

against Hunst:

in a bill of exchange, extends to this. Williams v. Harrison, Carth. 160. And although it is expressed in this note that it was given for meat, drink, washing, lodging, and for TAURMAN instructing him in the business of a hair-dresser, yet if a promissory note, in which the consideration is not expressed, will not bind an infant; neither will one bind where it is expressed. An action will not lie against an infant on a bond though it be given for necessaries. Moor, 679. It has been determined indeed that an action will lie against an infant on a single bill: but there is a great difference between a single bill, and a promissory note; for an action on the first must be brought in the name of the person to whom it was given, in which case the consideration may be gone into (a).

As to the second: Instructing a person in the business of a hair-dresser, is not a sufficient consideration to bind an in-In Brooke, executor of Hobart, v. Galley (b), Lord Hardwicke said. "infants are under a disability of contracting debts, except for bare necessaries: and even this ex-" emption is merely to prevent them from perishing." 1 Rol. Abr. 729. Cro. Jac. 494 (v). A covenant to bind an apprentice will not hold, unless warranted by the custom of London.

As to the third objection: The nature of an account stated is this; the parties meet, discuss their several claims, and strike a balance; at which time either party is at liberty to destroy the vouchers, &c. and after that the balance is never to be disputed. May v. King, Bull. N. P. 129. If the bahance be conclusive on the parties, then an action on an account stated will not lie against an infant; because he is thereby precluded from going into the consideration; and the jury cannot determine whether the consideration on each of the items was for necessaries or not. Gro. Fac. 602. Latch, 169. Noy, 87: 2 Rol. Rep. 271. Palmer, 528.

Baldwin, for the plaintiff, was desired by the Court to con-

fine himself to the last point.

The cases cited on the other side are to be found only in the old books; and since that time the Courts have been more liberal in their decisions. The case of a single bill is in point. This note is not negotiable; and the consideration is expressed in it. It is now settled that a party may go into the items on an account stated, which abates the force of the objection: and it would be hard, if the Court can go into the items, that a note being given for them should make Vol. L ary

> (b) 1 Lev. 86. (b) 2 Atk. 35.

(t) 2 Rol. Rep. 271.

TRUEMAN aguinst Hugst.

any difference. The only question then is, whether that account were for necessaries? If this replication, as it now stands, went before a jury, they would enquire which of the items were for necessaries; and the plaintiff would not be bound by the account, as stated. The account stated is expressed to be for necessaries; viz. for meat, drink, &c. which the demurrer allows.

Lord Mansfield, Ch. J. The authorities are all one way, that this action will not lie. What is an account stated? It is an agreement by both parties, that all the articles are true. This was formerly conclusive; but a greater latitude has of late prevailed in order to remedy the errors which may have crept into the account in surcharging the items. But an infant cannot bind himself by stating an account; therefore, on the reason of the case, and on the authorities, I think there should be judgment for the defendant.

WILLES and ASHHURST, J. concurred.

BULLER, J. A later case (a) than those which have been cited, has been determined, which settles this case. There, this Court were unanimously of opinion, that an action would not lie on an account stated against an infant (b). The ground is this, the only consideration for the promise is the stating of the account: now if an infant cannot state an account, the consideration does not hold, and the promise is void.

The plaintiff had liberty to amend on payment of costs.

(a) Bartlett v. Emery, Hil. 2 G 2. B. R. In arguing this case upon a writt of error out of the Court of Litchfield, Raymond, C. J. Page and Reynolds, J. agreed, that on an insimula computasset the plaintiff is not obliged to give evidence of the several items constituting the account, but it is sufficient if he prove the account stated, for that is the cause of the action; but an insimula computasset lies not against an infant, though the particulars of the account were for accessaries; for an infant cannot agree to any such account, and the assumptait is upon the account. MSS

(b) Sharp v. Ray, Tr. 30 G. 3. B. R. S. P.

## BARTLETT against HODGSON.

A clause in a marriage settlement, "that the "trustees HIS was an action of debt on a bond in the penalty of 600l. given to the plaintiff by one Peter Holme, to whom the defendant was sister and heir at law, and also devisee of certain estates, &c.

" should not be charge-

Plea

"able with or accountable for any money arising in execution of the said trusts, but what the person or persons so to be accountable should actually receive," does not bind the trustees as a covenant; but is a clause of indemnity, to take away that responsibility which each would be subject to for the acts of the others, were it not for this clause: and only leaves each of them accountable for what he actually receives as for a simple contract debt.

Plea, plene administravit; and (inter alia) that she the de- 1785, fendant had a right to retain for a debt due to herself in the following manner: "That by an indenture made the 20th BAGFLETS "June 1759, between the defendant of the first part, one against Honoson. "Thomas Hodgson of the second part, and the said Peter " Holme and one J. Hardman of the third part, it was wit-46 nessed that, in consideration of a marriage then intended to be had and solemnized between the said Thomas Hodgson and the defendant, the defendant E. Hodgson did give, es grant, bargain, assign, and set over, unto the said Peter " Holme and J. Hardman, their executors, administrators, 44 and assigns, all and singular the personal estate of the said defendant, upon certain trusts mentioned in the said in-46 denture; and it was thereby further declared and agreed 46 by and between the parties to the said indenture, that the " said Peter and John, and their heirs, should not be charge-" able with, or accountable for, any money arising in execu-"tion of the said trusts in the said indenture, but what the te person or persons so to be accountable should actually receive. "That the marriage was solemnized. That Thomas Hodgson afterwards died. That J. Hardman died in the life-" time of Peter Holme, who afterwards died also. That on " the death of the said P. Holme, administration of his es-"tate and effects was granted to her the defendant. That " in pursuance of the said indenture, the said P. Holme in "his life-time received 1,800% part of the said personal estate of the said defendant. That the said P. Holme did not, at any time during his life, apply the said sum of 1,800%. " or any part thereof, in execution of the said trusts, but the " same remained in his hands, for the purposes mentioned " in the said indenture; and that the said P. Holme was then " accountable for, and chargeable with, the same, by virtue of the said indenture, and of the said proviso."

The like of another sum of 1000l. received by the said P. Holme, under another indenture made between the same par-

ties and for the same purpose.

That those two sums, together with others secured by mortgage,  $\mathfrak{S}_{\mathcal{C}}$  exceed the assets that have descended to her.

To this plea there was a general demurrer.

Wood for the plaintiff contended that this plea, if bad in part, was so in the whole. The part he impeached was that of the retainer. The trusts of the marriage settlement are not expressed in this plea; so that it does not appear whether the defendant is beneficially interested in them or not. The supposed misapplication of the two sums by P. Holme amounts

1785. against Hopeson.

amounts to nothing more than a breach of trust, and is no charge on his real estate. In Vernon v. Vawdry (a) it is said, BARTLETT that " a breach of trust is considered but as a simple contract " debt, and can only fall upon the personal estate of the trus-"tee." Now this plea does not state that she has personal assets; and if she has, they are first to be applied in the discharge of this specialty.

S. Heywood, contra, insisted that this was not merely a breach of trust, but an express covenant, which binds the heirs If it be held that this is only a clause of inof the trustees. demnity, lest the trustees should be accountable for more than they received, there would have been no occasion for the latter part of the sentence, which expressly binds each, and his

heirs, for what he should actually receive.

Lord Mansfield, Ch. J. This is a common clause of indemnity, which is inserted in all settlements. The sense of it is this, that the trustees and their heirs shall not be accountable for more than they receive: they are accountable for what they actually receive, but not as under a covenant.

Ashhurst, J. It is not a clause of charge, but rather of discharge and indemnity; it is to take away that responsibility, which each would be under for the acts of the other, were

it not for this clause.

Judgment for the plaintiff.

(a) 2 Atk. 119.

## JONES against SMART.

A diploma conferring the degree of doctor of physic, granted by either of the universities in Scotland, does not give a quali-

CTION of debt on the Stat. 5 Ann. c. 14. made perpetual 1 by the 9 Ann. c. 25. to recover a penalty for killing game without being duly qualified; tried before Lord Mansfield at the last assizes in Surry. Plea, the general issue. Evidence under it, a diploma from the university of St. Andrews in Scotland, appointing the defendant doctor of physic; which it was contended gave him a sufficient qualification under the 22 and 23 Car. 2. c. 25.

This point now came on before the Court in the shape of fication to kill game a special case; and the only question for the opinion of the under 22 and Court was, whether the diploma were a legal qualification? 23 Gar. 2 c.

Const 25. An eqquire, or

other person of higher degree, as such, is not qualified under that act; though the son of an exguire, or the son of other person of higher degree, is.

#### IN THE TWENTY SIXTH YEAR OF GEORGE III.

Const for the plaintiff contended that the defendant was not qualified. 1st, Supposing him to have the same rank as a doctor of the English universities, yet he is not such a character as was meant to be qualified by the statute of Charles the Second.

JONES against SMART,

By the 1 Jac. 1. c. 27. the exception extends only to persons qualified in respect of property, or the son of a knight or lord, or the son and heir apparent of an esquire. The 3 Fac. 1. c. 13. is confined to property alone. The 7 Jac. 1. c. 11. still confines the right of killing game to property; only increasing the qualification. The principal statute is the 22 and 23 Car. 2. c. 25; which enacts, that "every "person not having lands and tenements, or some other " estate of inheritance in his own or his wife's right, of the " clear yearly value of 1001. per annum, or for term of life, "or having lease or leases of 99 years, or for any longer term, of the clear yearly value of 150% (other than the son " and heir apparent of an esquire, or other person of higher " degree, and the owners or keepers of forests, parks, chases, " or warrens, &c.) is hereby declared to be a person by the " law of this realm not allowed to have or keep for himself " or any other person, any guns, &c. for the taking and kill" ing of game."

The qualification, claimed by the defendant in this case, must be derived from construing the words of the statute, " or other person of higher degree," in the nominative case, and supposing that every person of higher degree than an esquire is thereby qualified. That this is not the true construction of the statute is clear by the case of The King v. Utley, 24 Geo. 3. in this Court. That was an information on the game laws; and a conviction of the defendant on the statute of Car. 2. as "not being the eldest son of an esquire, " or of other person of higher degree." Chambre moved to quash this information on the insertion of the word "of;" and contended, that though this was copied from the precedent in Burn, it was not warranted in law, for that by this construction, neither an esquire or a knight would be qualified as such. Mr. J. Buller there said, that the Legislature seemed to him to have taken it for granted that an esquire or other person of higher degree would have a sufficient estate to qualify him, and therefore they had neglected to do it expressly; though there was a case in Lord Hardwicke's time, where the word "of" was rejected, and no notice taken. However, he was of opinion that the conviction should be affirmed: and it was so.

He

JONES against SWART.

He then quoted Camd. Brit. vol. 1. fo. 130. and Selden, cap. 1. to shew that esquires were originally persons qualified by estate.

2dly, Supposing that doctors of the two English universities have the right contended for by the present defendant (which in itself is a very doubtful matter), yet, this diploma does not confer such a right. There is no instance in which foreign diplomas and degrees have been acknowledged here: there is a great difference between degrees acquired by long labour and residence, and one bestowed in a summary manner. 8 Rep. 144. Doctor Bonham's case.

By the union with Scotland, it does not follow that persons who have taken Scotch degrees are to be endued with all the privileges which are bestowed by tegrees taken at the English universities: the universities themselves do not admit of such degrees. Doctor Gilbert some years ago, having taken his degree of doctor of divinity in Scotland, wished to preach in the university of Oxford, in his proper habit, as doctor, but was not allowed by the university. And doctor Pitcairn accepted a degree at one of our universities, although he had before taken the same degree in Scotland.

Erskine for the defendant made three questions—1st, Whether, on the construction of the statute 32 & 23 Car. 2. every person as a member of the civil state, who is an esquire, or superior in rank to an esquire, may not kill game?

2dly, Whether a doctor of physic who has taken his degree at either of the English universities be not such person?

3dly, Whether a Scotch diploma does not confer the same privileges?

As to the first: The language of the statute is very strong; the word "other" must be considered as the nominative and not as the genitive case, both in reason, and according to grammatical construction. It is clear the statute did not mean to confine the qualification altogether to landed property, by extending it to the son and heir apparent of an esquire, who is supposed to have no landed property of his own. The esquires also who are enumerated by Camden are persons who have no land. From 8 Rep. 118. we may collect that when a statute will bear two interpretations, one contrary to sense, the other agreeable to it, the latter shall prevail. Here it was evidently the intention of the Legislature that persons of higher degree than an esquire should have a qualification; for if the opposite construction were to prevail, a person would have a derivative title, when the person from whom

such title was derived, would have none at all: and this very defendant's son will derive a right from his father's diploma, which it is contended the father himself cannot.

JONES against SMART:

2dly, As to the question whether a doctor of either of the English universities be a person of superior degree to an esquire, all ranks and precedencies are settled in three ways: either by act of parliament, or by the King's patent, or by immemorial custom; Burn (a) taken from Blackstone (b) ranks doctors above esquires; so do the Heralds: this is the very best authority which can be had from the nature of the case. But this relates only to English degrees. Then,

3dly, Does a diploma from Scotland confer the same right? A Scotch doctor is of equal rank with an English one as a member of the civil state. The 4th article of the act of union says, there shall be a communication of all rights, &c. except where it is expressly agreed on to the contrary. As to the college of physicians, and the two universities, refusing to allow to Scotch doctors their own privileges within their respective jurisdictions, they, as private corporations, have a right to make what regulations they please concerning their own bodies; but as to all general immunities derived from the common law, or under the act of union, they cannot deprive any body of these.

The Court took time to consider of their opinion: but Lord Mansfield then said, that as to this latter ground, he had no doubt that all privileges, granted by the statutes to the universities, were confined to our own, and did not extend to Scotland, or other foreign universities, which were governed by their own particular laws and customs. But that the general question upon the construction of the statute of Car. 2.

should not pass undecided.

Afterwards the Court delivered their opinions seriatim.

Lord Mansfield, Ch. J. This is an action of debt brought by the plaintiff against the defendant, for using a gun for the purpose of killing game, not being duly qualified under the statute. The special case states that the defendant tested his justification upon a diploma which was produced, whereby the university of St. Andrews in Scotland had conferred on him the degree of doctor of physic. Two objections have been raised by the counsel for the defendant against the competency of this action. First, that under this diploma the defendant hath the same rights and privileges

(a) 2 Burn, 260.

(b) 1 Black. Com. 405.

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conferred upon him, as are required by a degree bestowed by either of our universities. 2dly, That doctors in all the learned professions are of higher degree than an esquire: and therefore by the 22 & 23 Car. 2. they are exempted from the penalties of the several statutes relating to game.

The statute 22 & 23 Car. 2. has these words "other than "the son and heir apparent of an esquire, or other person of "higher degree." For the defendant it has been contended that "other person of higher degree" relates to the esquire himself, and means that a person of higher degree than an esquire is qualified; whereas on the other side it is contended: that it means "other than the son and heir apparent of " an esquire, or the son of any other person of higher degree." To be sure, absurd consequences may seem to follow from giving a privilege to the son, which the father has not: but the question is, has the statute done it or not? I wished to have the general point determined, because of the consequences. This Court considered the point once before in the case of The King v. Utley; and there they held, that the statute meant the sons of other persons of higher degree. On full consideration I am not ripe to vary from the opinion given in that judgment. All the precedents are so: Burn's precedent gives the same construction. But what struck me most was this, the drawer of this statute of Car. 2, certainly had the former statute of Jac. 1. in his view; for though it do not follow the other statute throughout, yet it does in that clause, and that does not admit of a doubt; for there the word "of" is expressly inserted. I cannot therefore unnecessarily vary from the decision that has been given; I say, unnecessarily, because I am satisfied on the other ground of the opinion which I delivered the other day.

On that ground there is not a colour for saying that the defendant is qualified by the act of union. It is true, that by the fourth article of that act, the Scotch have the same general privileges as the English, but then they must have the same qualifications, otherwise they come not within the same description; for the general article, which declares there shall be a communication of all privileges, can only mean such as are of a general nature. A burgess of London is endued with certain privileges, to which a burgess of Edinburgh has no claim: so in every case where a privilege is of a qualified nature, it must be understood with that qualification. A doctor of the English universities may become a member of the college of physicians; may plead in Doctors' Commons; and has various

various other privileges, from all of which a Scotch doctor, as such, is excluded. The qualification therefore must be from Oxford or Cambridge. In like manner, the statute allowing men of certain degrees to have dispensations for holding two livings necessarily refers to such degrees only as are obtained in an English university; for the church of Scotland is distinct from ours, and admits not of the same rules. Therefore whatever rank the defendant may hold by curtesy, he is not in point of law to be considered as a doctor to this purpose.

Jones against

Willes, J. It is my misfortune to differ from the rest of the Court on the construction of the statute of Car. 2. The case of the King and Utley came before us on a motion to quash a conviction on the 22 and 23 Car. 2. c. 25. on account of the word "of," being inserted before the words "other persons of higher degree." I find, by looking into my own paper-book, that the case was but slightly argued; and the Court principally relied upon the ground that all the precedents were in that form. I adopted that opinion at the time, but I now beg leave to retract my assent to that determination, for three reasons:

1st, The game laws are already sufficiently oppressive, and

therefore ought not to be extended by implication.

2dly, Because I think that, in grammatical construction and propriety, the words "other persons" must be taken to be in the nominative, and not in the genitive, case.

3dly, Because a different construction is unnatural and unreasonable, and must be productive of endless inconvenience

and absurdity.

First, Nothing can be more oppressive than the present system of the game laws. We are told that they arose from the old forest laws, which restricted the right of killing game to much narrower limits; and hence that these new regulations encroach on no privileges to which we were before entitled, are introductive of no new or extraordinary severities, but on the contrary are mild and supportable when compared with the sources from whence they flow. Mr. Justice Blackstone, however, in the 2d book of his Commentaries, c. 27. holds a different language. And wherever a law is productive of tyranny, I shall ever give my consent to narrow the construction.

2dly, According to the grammatical construction of that clause in the statute, in my opinion, the words "other per"sons of higher degree" must be taken in the nominative case, for want of the word "of;" and I am the more confirmed in this opinion; for where the legislature meant the
Yol. I. Henry genitive

Jones against SMART.

genitive case, they have expressly inserted the word "of;" as in the statute 1 \( \frac{7}{ac} \). 1. c. 27. which is one of the statutes for the preservation of game, and the 9 \( Ann. \, c. 5. \) 2. which relates to qualifications for sitting in parliament. But,

3dly, What I most rely on, are the many unaccountable. absurdities which must flow from a different interpretation. The eldest son of a barrister at law, or of a captain in the army or navy, will be qualified as such, and yet the father himself will not. Even a peer, who is not qualified by property, will not be privileged to hunt or kill game; though his son, who claims through him, will have that privilege. The act could never mean to annex the qualification to land only: the term esquire has no relation whatever to landed property; for no landed estate, however large, will confer the title; but it must be acquired either by office, the king's patent, or some of the means laid down by Selden and Camden. A lord of a manor is certainly not an esquire by virtue of his manor or royalty, though in common acceptation he is considered as such. This is evident from the 2d section of the 22 and 23 Car. 2. c. 25. which empowers lords of manors or other royalties, not under the degree of an esquire, to appoint game-keepers; but no lord of a manor under that rank can make such an appointment, whatever his estate may be. On the other hand, was ever an esquire, since the passing of this act, convicted on it? If no instance of any such conviction can be produced, that shews the general sense of the nation as to this act, and is a much more powerful argument, and has greater weight with me, than any faulty precedent in Burn. If we look into the preambles of the statutes upon the same subject, is it not plain against whom they are pointed? Chiefly against persons of low degree; to prevent mechanics from leaving their lawful trades and employments to kill and destroy the game, to the prejudice of noblemen. gentlemen, lords of manors, and others. For these reasons, I think gentlemen of this description ought not to be deprived of their amusements; and this is my opinion on the general import of the act: how far it may affect the present question. is another matter.

As to the second point. If an esquire, as such, be qualified, I am likewise of opinion that doctors are so. To that it is objected, that, at all events, a person, who has not taken his degree at either of our own universities, is not to be considered in the light of a person qualified by the same means that those are. But this objection is in my mind done away by the 4th article of the union, which enacts that there sha

be a communication of all privileges, except where it is expressly provided to the contrary. As to their being excluded by the college of physicians, that is merely the result of a local institution. However, as the rest of the Court are against me on the first point, I shall give no further opinion upon this.

Jo es against SMART.

ASHHURST, J. I see no reason for departing from the coustruction which has been put upon the statute 22 and 23 Car. 2. by this Court in the case of the King and Utley. The game laws are rather to be considered as positive rules, than as founded on reason; therefore it is safer to adopt what they have actually said, than to suppose what they meant to say. Though by the statute of Jac. 1. rank as well as property gave a qualification; yet under this statute of Car. 2. a man can only be qualified by means of property. But, said the legislature, the heir apparent, who is in the line of succession, shall likewise be qualified, from a supposition that the esquire was so already. According to which construction, I cannot think that it was their intention purposely to exclude the father, but in fact they have done it; and the matter is put out of all doubt by the statute of James, which expressly excludes them: and so does the statute of Car. 2. as effectually in my opinion. The blunder has been adopted perhaps without meaning it. This appears to me from the wording of the clause; for it should seem strange, that in fixing the qualifications, they should begin with property, then go to a derivative qualification, and then return to a very large description of original ones, namely, quality and degree. In a grammatical sense also, it must be taken to be in the genitive case, in the same manner as if the word "of" had been acmally inserted. I see no reason to depart from the construction put upon the statute Car. 2. in the King and Utley, as founded on the precedent in Burn; nor can any inconvenience result from it; for the legislature may hereafter extend the qualification, if they think proper. It is not necessary to say any thing upon the other head; if it were, I should agree with my Lord.

BULLER, J. The case of the King and Utley did not pass with so little argument as my brother Willes supposes; for I remember it was argued very fully; and the grounds of our decision were: 1st, The constant form of convictions on the game laws, which ought to have great weight with the Court (a). 2dly, From a comparison of the several acts relating to game. But notwithstanding that decision, if at this

moment

(a) Vide R. v. Thompson, post. 2 vol. 18. & R. v. Mason, ib. 585,

Jones againt SMART.

moment I saw any reason to alter the opinion which I then gave, I would readily do it, and correct my mistake. But, upon the best consideration, which I have been able to give the subject, in my opinion that judgment was right. Taking this clause of the act of Car. 2. in a grammatical sense, had the exception extended no farther than to "other " persons of higher degree," still I should have thought that the word "of" was intended, and that the word "other" was to be understood in the genitive case: but I am confirmed in my opinion by the manner in which the clause proceeds; for the words immediately following are "and the owners and "keepers of forests, parks, chases, and warrens:" now, had the preceding part of the sentence, "or other persons of "higher degree," been intended to be taken in the nominative case, why did the legislature alter the mode of expression; for when they speak of other persons to be exempted in their own right, they then change the words. Again, it is asked, what reason is there for excepting the elder son alone, and not the younger? The only reason that can be given is, because the eldest son is presumptive heir to the real estate, which is a further argument for supposing that landed qualification was the immediate object of the statute; and in fact this act of Car. 2. had that principally in view; for it repeals the personal qualification of the statute of James, and leaves no other qualification but that of land, with the exception in favour of the heir apparent, on account of his right of succession. And we may observe that there is the same exception introduced into the act for qualifications of members of parliament. I have no doubt but that the legislature took it for granted that esquires themselves would be qualified in respect of their land; and, for the reasons assigned, extended the qualification to their eldest sons. So that had the legislature been asked at the time of making this act whether they intended to exclude the younger sons of dukes? they would have answered, no. But I am as firmly persuaded that had the same question been put to them with respect to doctors, they would have answered in the affirmative. Be that as it may, we are bound to take the act of parliament, as they have made it: a casus omissus can in no case be supplied by a court of law, for that would be to make laws; nor can I conceive that it is our province to consider, whether such a law that has been passed be tyrannical or not. It has been said that this act is only pointed against persons of low degree, as appears from the preamble. To consider the preamble of an act is to be sure in general a good mode to come at

the meaning of the legislature, but it does not assist us in this case; for we gather from the enacting part of the statute that a person who has a freehold of 991. per annum, or a leasehold for 99 years of 1491. per annum, is not qualified; but can it be said that either of these is a mean or vulgar person?

1785. JONES against

Thus far we have been considering the statute of Car. 2. alone; but now consider it as coupled with the former statutes which are in pari materia. In the statute of James, the same words, "other persons of higher degree" are used; and there it is clear that they are used as part of the description of the sons, for the particle "of" is expressly prefixed: now if the statute of Car. 2. be any ways doubtful, we must expound it by the statute of James, and that is confined to sons alone.

But the strongest ground of all is, that all the acts relative to game have been from time to time restrictive of the right to kill game. They abolish some qualifications, and raise the others, and consequently lessen the number of qualified persons; and no one statute can be construed into an enabling one. This is decisive. There is not a pretence to say that a doctor of physic is within the exception of the statute of James; then if he be not within that statute, how can he be said to be qualified under the statute of Car. 2. which is a restraining one, and gives no new qualification whatever?

As to the other question, whether a doctor of physic of the desendant's description be qualified, I think he is not, on another ground: but on this head I refer generally to what

my Lord has said.

Judgment for the plaintiff.

# MESSENGER against ARMSTRONG.

CTION for double rent. The first count of the decla-If a landlord A ration stated that the plaintiff at Whitsuntide 1781, de-give notice to his tenant mised a certain messuage and tenement to the defendant for to quit at the three years, at the yearly rent of five guineas per annum. expiration That the plaintiff, before the determination of the lease, gave of the lease, the defendant notice to quit at Whitsuntide 1784: that the de-nant hold sendant held over, and that double rent became due from over, the landlord is Whitsuntide 1784. entitled to The double rent?

MESSEN-OER against ARM-

STRONG.

And a se-

the tenant after the ex-

to quit on a

" rent," is

such first

the double

rent which

under it.

cond notice.

1785.

The second count stated another notice, served on the 3d of June, (after the expiration of the first notice to quit at Whitsuntide) to quit at the Martinmas following, or to pay double rent.

On the trial before Mr. Justice Heath, at the last assizes at Carlisle, the defendant's counsel contended that the first notice was waved by the second: but the judge thought that, as the double rent was incurred before the second notice, the delivered to plaintiff ought to recover. Verdict for the plaintiff for double rent from the expiration of the first notice.

On a motion to set aside the verdict for a misdirection of

piration of the judge; Lee shewed cause against the rule, and insisted that the "subsequent second notice was either void, or it was a ratification of the "day, or to first. That the plaintiff, having a right to possess the pre-"pay double mises at Whitsuntide 1784, might have brought an ejectment, no waver of or demanded double rent from that time; and that the subsequent notice, having been meant to confirm the first, ought motice, or of not to be construed as an avoidance of the right which had once vested.

Lambe, in support of the rule, observed that one of the has accrued points at the trial had been, that the defendant had taken these premises for twenty-one years, determinable at the end of three years (a), which so far altered the case, that it made a notice to quit absolutely necessary before an ejectment could be brought, or double rent accrue. That the first notice was only given two months before the expiration of the three years, and that even had been waved by the second. That there was a difference between the two notices; the first was simply to quit, and the second was to quit, or to pay double rent, so that the plaintiff did not mean to receive double ren under the first: the second also recognized the tenancy to continue. Cowp. 247.

Lord Mansfield, Ch. J. Where a term is to end on a precise day there is no occasion for a notice to quit, because both parties are apprized that unless they come to a frest agreement there is an end of the lease (b). Here it ended a Whitsuntide; the landlord, before the time expired, told th tenant, "you know you are to quit;" the meaning of tha is, " If you do not quit, I will insist on my double rent.">-And he gave him a second notice afterwards, wherein sai

(a) This did not appear from the Judge's report.

(4) Post. 162\_

said is so many express words what was before to be collected by intendment. There is no colour for the motion.

Per Curiam.

Rule discharged.

MESSEN-GER against ARM-STRONG.

# PYNE against DOR.

THIS came on in consequence of a motion made on a for-Anaction mer day by Mingay for a rule to shew cause why a non- of trover cannot be entered.

BULLER, J. read the following report. This was an ac-by a tenant tion of trover brought by the tenant in tail, expectant on the in tail, exdetermination of an estate for life without impeachment of pectant on waste, for timber which grew upon, and had been severed mination of from, the estate, and was in the possession of the defendant, an estate for

On the part of the plaintiff, a deed of settlement was pro-life, without duced and proved. This deed was executed in *Ireland*, and impeachment of the registry there. It was ob-waste, for jected that the registry ought to be proved. But this objec-timber tion was over-ruled. Under this settlement, the plaintiff, which grew being the eldest son of John Pync, became tenant in tail, ex-was severed person to the determination of an estate for life limited to from, the John Pyne, his father, without impeachment of waste. was proved that one Searl gave the orders for cutting the timber in question, and that Searl sold it to the defendant Dor. It was also proved that Searl had been appointed by John Pyne, the tenant for life, to take care of the mansionhouse at Codham-Hall, to which the lands upon which the timber grew belonged. That John Pyne afterwards married &arl's sister, and left Codham-Hail in the care of Searl. That when Searl succeeded to the management of Codham-Hall, the estate was very well timbered; that there were 70 acres of wood in good order; that after Scarl came there, the trees were cut down at all times, without regard to the seasons for peeling the bark; and that a great number of ornamental trees were cut down. Notorious devastation was proved.

It was objected for the defendant that the property was in the tenant for life, without impeachment of waste, and not in the plaintiff. Mr. Baron Eyre put it upon the defendant to shew, that the timber was cut and sold by order of the tenant for life.

Some letters were read on the part of the defendant, written by John Pyne, the tenant for life; in one of which Searl was directed "to take care of the wood."

After

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PYNE against Don.

After a short argument on behalf of the plaintiff by Reas and Garrow, the Court thought the case extremely clear.

Lord Mansfield, Ch. J. In the first place, this is an action of trover. An action of trover must be founded in the property of the plaintiff. But what property had he in this timber? None. A tenant for life, without impeachment of waste, has a right to the trees the moment they are cut down.

As to the distinction between waste and destruction, it has lately been introduced into the Court of Chancery; and I agree with the counsel at the bar, that when a general rule of property is established by a court of equity, it should be followed by a court of law, that their decisions may be uniform. In the case of Raby Castle (a), which was a suit for maliciously unleading the house, and pulling down the tiles. &c. which occasioned the ruin of the castle, the friends of the infant brought a bill to restrain the tenant for life. Lord Cowper thought that this waste could not be protected within the clause, "without impeachment of waste," and decreed accordingly. By steps, that Court have gone a little further, and they have protected an avenue leading to an house (b), but not all ornamental timber. And in the case of Sir Herbert Packington (c), they went a little further; for they protected trees which were either an ornament or shelter to the house. In this case, the distinction between ornamental and other timber is not made: damages were not given on such a distinction; for they were very inconsiderable, only 201. I am of opinion that the plaintiff cannot maintain this action. Rule absolute (d).

(a) 2 Vern. 738. Vane v. Lord Barnard.

(b) In Charleton v. Charleton, mentioned by Lord Hardwicke in 3 Att. 216. Lord Chancellor King extended the protection to trees in 2 park.

(c) 3 Atk. 215. 5 Bac. Abr. 491. (d) Vide Herlakenden's case. 4 Co. 62.

### ALLEN against HEARN.

A wager
between two ASSUMPSIT upon a wager. This was an action tried bebetween two fore Lord Mansfield at the sittings after last term, at
voters, with Guildhall, to recover 100l. won on a wager by the plaintiff
respect to
the event of the defendant, on the event of an election of a member to
an election serve in parliament for the borough of Southwark, when the
of a member jury found the following special case:

That

parliament laid before

the poll began, is illegal.

17854

ALLEN against

HEARN

That the borough of Southwark sends two members to parliament; and that on the 22d June 1784, there was a vacancy in the room of Sir Barnard Turner. That Mr. Le Mesurier and Sir Richard Hotham were candidates for the said borough. That the plaintiff and the defendant were voters and partizans of the respective candidates, and had canvassed and taken decided parts on opposite sides; the plaintiff being for Mr. Le Mesurier, and the defendant siding with Sir Richard Hotham, before the bet was made. That the bet stated in the first count of the declaration was made before the poll began, and both parties voted for their respective friends, and solicited other voters. That Mr. Le Mesurier was duly elected, and returned as member of the said borough at the said election.

The question is, whether the plaintiff is entitled to recover

in this action?

Le Mesurier for the plaintiff observed that, as wagers in general, were legal, he might put it on the defendant's counsel to shew in what respect the present instance was an exception from that general rule. However, he would shew that this was not within any of the exceptions yet laid down in courts of law upon this subject. The objection at the trial was, that such a wager was against sound policy, and so against common law; but at common law every thing was not considered as contrary to sound policy, which might be injurious to society, or which might tend to make men bad citizens; otherwise all gaming contracts would have been void at common law; so would insurances without interest; so would stock jobbing; without the necessity of particular statutes being passed for that purpose. What then were the decisions? .There were only two cases in which wagers were unlawful, both of which are laid down in Da Costa and fones (a). First, where the interest of third persons is concerned, as when the discussion on which the wager depends may be injurious to them; in which case the law says an innocent person shall not suffer from a mere voluntary transaction between two strangers. Secondly, where the public is directly injured; as where the wager is an incitement to a breach of the peace, as if a man lay a wager that he will knock another down; or an inducement to immorality, as if he lay that he will seduce a woman. third principle was attempted to be laid down in Foster v. Thackery (b), that wagers were unlawful from the magnitude Vol. i.

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<sup>(</sup>a) Comp. 729.
(b) Tr. 21 Geo. 3. B. R. That was a wager that war would be declared against France within three months; the opinion of the twelve Judges was taken

ALLEN against HEARN.

and public nature of the subject matter. But that was never decided: and he conceived even that that wager was good; for in 1 Lev. 33. there is a wager on Charles the Second's restoration, where the objection was never taken. And the act of 7 Ann. c. 16. makes void all wagers on peace or war for a limited time. The legislature must therefore have considered them to be lawful both before the passing, and after the expiration, of the act. But the case of Jones v. Randall, Cowp. 37. is decisive; for there it was resolved that wagers may be laid on the administration of the laws. That was a subject of greater importance than the present. The question whether any particular member shall be returned to parliament bears not the least comparison to it. The share which he has in the legislature is so small, and the probability of the public being at all affected by his election is so remote, as not to be mentioned in competition with so momentous a question, as what measure shall be dealt out to the subject from the highest tribunal of justice. He concluded therefore that this question stood clear of any objection which had been yet allowed by the Court; for this was the case of a bona fide wager, the parties betting on the side in which they were engaged, and for which they had been canvassing. Had corruption been either intended or practised, the transaction would have worn a different complexion, and would then have been tried by different rules.

Wood, contra, contended that this wager was void on the general principles which had been adopted in Jones v. Randall; where it was to be collected that a wager was void, if against the principles of morality or sound policy. That the case of Jones v. Randall was distinguishable from the present; for there neither of the parties concerned had any influence in the decision of the question, though they were interested in the event. That this action was not only repugnant to morality and sound policy, but particularly so to all the acts of parliament that had been passed for preserving the purity of elections. That it countenanced bribery in the highest degree; and at all events was the means of influencing voters before the election, for it was equivalent to binding themselves under such a penalty to vote for a particular person.

The case of Jones assignee of Knight against Parry was a bet upon the Bristol election which was tried before Lord Mansfield at Guildhall. There it did not appear whether

taken on the point, whether that wager were void under the stat. 14 G. 3. c. 48. The Courts of B. R. and C. B. were of opinion that it was; and the Court of Exchequer contra. But no judgment was ever given on the case.

the parties were voters or not; for the moment Mr. Wallace had opened the case, Lord Mansfield thought it was a colour

for bribery, and nonsuited the plaintiff.

Le Mesurier, in reply, denied that the laws watched the exercise of that public trust which was lodged in the voter, with such jealousy as was contended for by the defendant's counsel. All it required was, that he should not sell his vote: he was open to all other motives of partiality, prejudice, affection, or resentment, which are so highly criminal in other public trusts. He may withhold his vote entirely if he please, or he may engage it by a previous promise, and such a promise will bind many honest men much more forcibly than any influence arising from pecuniary considerations like the present.

The principle of elections is, that they should be free; and that freedom is not affected by any restriction which the voter voluntarily imposes upon himself. But if this be an influence, it must be such an one as the candidate could employ: now he could not procure a vote by endeavouring to persuade a voter that he might gain by laying such a wager as the present. It is absurd to call this an influence which can operate only indirectly, but not directly; which is binding only when it originates with the voter himself; but which becomes ridiculous if suggested by the party for whose benefit it is to be created. And in fact it is no benefit to the candidate; for if it secure him one vote, it equally alienates another.

Lord Mansfield, Ch. J. Whether this particular wager had any other motive than the spirit of gaming, and the zeal of both parties, I do not know: but this question turns on the species and nature of the contract; and if that be in the eye of the law corrupt, and against the fundamental principles of the constitution, it cannot be supported by any court of justice. One of the principal foundations of this constitution depends on the proper exercise of this franchise, that the election of members of parliament should be free, and particularly that every voter should be free from pecuniary influence in giving his vote.

This is a wager in the form of it by two voters, and the event is, the success of the respective candidates. The success therefore of either candidate is material; and from the moment the wager is laid, both parties are fettered. It is therefore laying them under a pecuniary influence; it is making each of them in the nature of a candidate. If this be allowed, every other wager may be allowed. But this is not all—a gaming contract should not be encouraged, if it has a dangerous tendency. What is so easy, as in a case

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against
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where

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where a bribe is intended, to lay a wager? It is difficult to prove that the wager makes him give a contrary vote to what he would otherwise have done: but still it is a colour for bribery. It has an influence on his mind. Therefore, in the case in Cowper, if the wager had been laid with a lord of parliament or a judge, it would have been void from its tendency, without considering whether a bribe were really intended or not. This is of that nature, and therefore void.

WILLES, J. delivered his opinion to the same effect.

ASHHURST, J. It is a very different case from engaging a vote by a promise only, because many things may happen to release a man from such an engagement with perfect honour, as if the candidate's character were impeached, &c.: But the bias occasioned by a wager cannot be so got rid of.

BULLER, J. If you put the case of a wager between a voter, and another person who is not one, it is a palpable bribe; it is a sum of money laid to procure a particular vote, and that case cannot be distinguished from the present. The bias is exactly the same: it is a pecuniary compensation. It is true, as the counsel for the plaintiff said, that the law leaves it to the voter to exercise his franchise or not, but it also requires him to be free till the last moment of giving or withholding his vote; which he cannot be, if he has laid such a wager as the present.

Let the postea be delivered to the defendant (a).

(a) Vide Good v. Elliott, post. 3 vol. 693; and the cases there cited.

## BRANDLING against KENT.

A gaoler is bound to receive a prisoner tendered to return day of the writ, on which he is arrested. Qu. Whether he is not likewise bound to receive a prisoner arrested after the return

day ?

A gaoler is bound to receive a prisoner tendered to him after the his deputy, pleaded, that he had safely keep all prisoners, &c.

The plaintiff by his replication stated that on the 6th of November 1785, a latitat issued against William Clarke, on which a warrant was made to hold him to bail; that Clarke was arrested, and that on the day following, the officer, who had arrested him, tendered him to the defendant, who refused to receive him, in consequence of which he escaped.

Rejoinder. That the tender of Clarke was after the return day of the writ; on which a special demurrer, that the defendant by his rejoinder tendered an immaterial issue; and joinder.

Wood

Wood for the demurrer said, there was no doubt but that a gaoler was obliged to accept a person who was tendered to him after the return day of the writ: that the case was too plain to argue.

1785. against

Kent.

Chambre, contra, maintained that though such had been the general practice, yet no authority could be found to sup-That if the arrest were made after the return day, it would be illegal, and false imprisonment would lie against the gaoler for receiving him. That this replication did not suggest that any indemnity was offered to the gaoler in case the arrest was not really made before the return day. Another objection was, that it was not directly averred that the person arrested did not appear at the day: that was a necessary fact to be averred, because if he had appeared, the sheriff could not have been damnified. That this was an escape on mesne process: if it had been on execution, perhaps it would have been different.

Again, it is not sufficiently alleged that the escape was in consequence of the defendant's neglect; the replication should have stated by what act the prisoner escaped: it only states that the defendant was carried, as it appears, in the custody of the sheriff to the gaoler, who refused to accept him, so that the escape is not the necessary or immediate consequence of the refusal; for after the refusal, he was still in the custody of the sheriff. No fact is stated here on which the defendant could take issue: the breach assigned

is, that the gaoler did not indemnify the sheriff.

BULLER, J. It is said that, in consequence of such refusal to receive the man, he escaped; and as to the manner in

which he escaped, it is mere form.

Ashnurst, J. The gaoler stipulates by his bond that he will receive all prisoners: here a prisoner was offered, and he was rejected; that therefore is the breach.

Chambre observed again that that was not the breach assigned: it was his neglect in not indemnifying the sheriff.

Lord MANSFIELD, Ch. J. It is not so. The breach of his condition is not receiving the prisoner: and the consequence, which is stated, is surplusage.

Chambre then solicited leave to amend, and take issue on

the tender.

BULLER, J. Supposing there had been any irregularity in the arrest, the shcriff alone is answerable for that. It would be a mischievous thing indeed if the gaoler were allowed to dispute it. As to the original defendant not appearing on the day, it is said in the replication, " on default "of the sheriff's having the body of the said William " Glarke." BRAND-LING against KENT. "Clarke." That is sufficient for the Court to see that he did not appear; and if he did, the defendant might have taken issue on it in his rejoinder. Mr. Chambre has said that the gaoler would be answerable, if the arrest were illegal on the face of it. I doubt that very much. It has been decided in the case of a pound-keeper (a), that he is bound to receive every thing offered to his costody, and is not answerable whether the thing were legally impounded or not. The gaoler was not answerable in this case. He should not have disputed the orders of the sheriff; and therefore we will not permit him to amend in the smallest instance.

Judgment for the plaintiff.

(a) Gowp. 476.

### ROBSON against EATON.

If A. be indebted to B. A SSUMPSIT for money had and received. Plea, that
debted to B. A after the making of the promises in the declaration mensuch debt to tioned, the plaintiff, by William Hodgson his attorney, imthe attorney pleaded the defendant in the Court of Common Pleas for
of a person the very same cause of action. That in the course of that
suing A. in suit it was ordered by the Court that the defendant should
but without pay to the plaintiff the sum of 62l. if the plaintiff would achis authoric cept thereof, in discharge of that suit; and if not, that the
ty, A. is
notwithstanding o- That, in pursuance of that order, he did pay the same into
bliged to pay Court, and that the said William Hodgson, the attorney for
B. again:— the plaintiff in that suit, took the same out of Court; with
and A.'s remedy is a an averment that the plaintiff and the defendant are the same
gainst the persons, &c.

attorney: Replication, that the said William Hodgson was never rethough such tained by the said plaintiff to implead the said defendant, or attorney conceived he impowered to receive the money out of Court for him.

was acting Rejoinder, (not denying that Hodg son was not retained by under the real authority of B.

Rejoinder, (not denying that Hodg son was not retained by the plaintiff, but) saying that the said William Hodg son was admitted and received on record by the said Court of Common Pleas as the attorney of the plaintiff, and permitted by the said Court to receive the said money out of Court.

Demurrer and joinder. It was admitted that both parties in this case were innocent of fraud. The fact was, that one Davies having procured a forged power of attorney, (the Lord Mayor of London being a witness thereto) went to Hodgson and commissioned him to bring the above-mentioned

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tioned action in the Common Pleas; he accordingly did so, and the defendant, as the action was in the plaintiff's name, and as it appeared upon the record that William Hodgson was the attorney put in by the plaintiff, paid the money into Court, which Hodgson took out, and paid it over to Davies, who has not been heard of since.

1785. Robson against

After argument by Baldwin in support of the demurrer, and Bower contra;

Lord MANSFIELD, Ch. J. There can be no doubt upon this case. The attorney, who trusted to the warrant of attorney, is liable, and *Davies* who committed the forgery is liable to him. The record of the Common Pleas amounts to no more than this, that the attorney prosecuted the suit in the plaintiff's name; but it does not state the authority given to him by the plaintiff for so doing.

Judgment for the plaintiff.

# The KING against EDWARD AYLETT.

THE indictment (after stating the proceedings in the Court of King's Bench, on which an attachment against the defendant was founded, and that a warrant thereon was directed to Matthew Lenard, to arrest him, &c.) stated, "That in Trinity Term, in the 24th year afore-"said, a certain cause was depending in Chancery, in which "Roger Moore and Jane his wife were plaintiffs, and the "said Edward Aylett and others were defendants; and that "such proceedings were thereupon had, that afterwards, to "wit, on the 4th of August, in the 24th year aforesaid, at "Lincoln's Inn, in the county of Middlesex, in a certain half "there, called Lincoln's-Inn-Hall, the said cause came on "to be heard before Edward Lord Thurlow, &c. then being "Lord High Chancellor of Great Britain. That the said "cause was then and there heard before the said Lord "Thurlow. That the said Edward Aylett, then being one "of the solicitors of the said Court of Chancery, attended "the hearing of the said cause as solicitor for himself and "one of the said defendants in the said cause. That after "the hearing of the said cause, and before the return of "the said writ, to wit, on the said 4th day of August in the "24th year aforesaid, the said M. Lenard by virtue of the "writ and warrant aforesaid, at the parish of St. Martin in

1785. againet AYLETT.

"the Fields, in the county aforesaid, did duly take and ar-" rest the said E. Aylett, and had and detained the said E. The King " Aylett in custody by virtue of the writ and warrant afore-" said. That after the said E. Aylett was so in the custody " of the said M. Lenard, to wit, on the said 4th day of August, " in the 24th year aforesaid, a certain complaint was made " for and on the behalf of the said E. Aylett to the said Lord " Thurlow, then being in the said Court of Chancery, then " held at Lincoln's-Inn-Hall aforesaid, that he the said E. " Aylett was so taken and arrested by the said M. Lenard "on his the said E. Aylett's way from the said hall cal-"led Lincoln's-Inn-Hall, after the said cause was heard as " aforesaid, to his the said E. Aylett's own house situate in " the parish of St. Martin in the Fields aforesaid in the said "county of Middlesex. That afterwards, to wit, on the "said 4th day of August in the 24th year aforesaid, the " said E. Aylett did appear in his proper person before the " said Lord Thurlow, then being in the said Court of Chan-"cery, then held at Lincoln's-Inn-Hall, in the custody of " the said M. Lenard, to be examined touching the said com-" plaint then and there to be heard. That it then and there "became and was a material question on the hearing of the " said complaint before the said Lord Thurlow, whether "the said E. Aylett was taken and arrested by the said M. " Lenard as aforesaid, on his the said E. Aylett's way from " Lincoln's-Inn aforesaid, after the said cause was heard as " aforesaid, to his the said E. Aylett's own house, situate in "the Haymarket, in the parish of St. Martin in the Fields, " in the county aforesaid. That the said E. Aylett at and " upon the hearing of the said complaint, to wit, on the +th day " of August, in the 24th year aforesaid, at Lincoln's-Inn " aforesaid, in the county aforesaid, in Lincoln's-Inn. Hall, " in the Court of Chancery, then and there held before the " said Lord Thurlow, was duly sworn and took his corporal "oath to speak the truth of and concerning the said com-" plaint (he the said Lord Thurlow then and there having " sufficient and competent power and authority to adminis-"ter an oath to the said E. Aylett in that behalf); that the " said E. Aylett being so sworn as aforesaid, to cause and " procure himself the said E. Aylett to be discharged from "and out of the custody of the said M. Lenard, on the " said 4th day of August in the 24th year aforesaid, in Lin-" coln's-Inn-Hall aforesaid, at and upon the said hearing of " the said complaint, upon his oath aforesaid, before the said "Lord Thurlow, so then and there having sufficient and " competent

" competent power and authority to hear the said complaint, " and to administer an oath to the said E. Aulett in that be-"half as aforesaid, falsely did say, depose, and swear, of and The King "concerning the said complaint, to the effect following, to "wit, that he the said E. Aylett had not been at home after "attending the cause (meaning that on the said 4th day of " August in the 24th year aforesaid, he the said E. Aylett had "not been at his said house, situate in the Haymarket ufore-"spid, in the said parish of St. Martin in the Fields, in the "said county of Middlesex, after attending the hearing of "the said cause in the said Court, before he the said E. "Aulett was arrested and taken by the said M. Lenurd as "asoresaid); and that he the said E. Aylett was arrested "upon the steps of his own door on his way home from at-"tending the Court in the said cause, and before he had "been within the door of his house (meaning that on the " said 4th day of August in the 24th year aforesaid, he the "said E. Aylett was arrested and taken by the said M. Le-"nard as aloresaid, upon the steps of the outer door of the "said house of him the said E. Aulett on his the said E. Au-"kit's way home to his said house from attending the said "Court on the said hearing of the said cause in the said "Court, and before he the said E. Aulett had been within "the said door of his said house); whereas in truth and in "factor the said 4th day of August in the 2+th year aforesaid, "he the said E. Aylett had been at his said house, after at-"tending the hearing of the said cause in the said Court, "before he the said E. Aylett was so arrested and taken by "the said M. Lenard as aforesaid; and whereas in truth and "in fact on the said 4th day of August in the 24th year "aforesaid, he the said E. Aylett was not appeated and taken "by the said M. Lenard as aforesaid upquethe steps of the "said outer door of the said house of the said E. Aylett, on "his the said E. Aylett's way home to his said house, from "attending the said Court on the hearing of the said cause, "and before he the said E. Aylett had been within the said That he the said E. A. lett on the "door of his said house. "said 4th day of August, &c. in Lincoln's-Inn-Hall afore-"said, et and upon the said hearing of the said complaint, upon "his oath Moresaid, before, &c. in manner and form afore-" mid, did commit wilful and corrupt perjuty, &c." After conviction, Erskine moved in arrest of judgment,

and made six objections in point of law to the indictment. After premising that it was an established rule in criminal Proceedings, that the charge must be laid positively (a), and Vol. L

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not by way of argument or inference; and that the want of a positive allegation of any thing material in the description of The King the substance, nature, or manner, of the crime, could not be supplied by implication or intendment; and that it was another rule, equally established, that the crime of perjury could only be committed in a judicial proceeding, which must be directly averred; he objected,

1st, That the indictment states this perjury to have been committed at and upon the hearing of the said complaint, without averring in direct and positive terms that the complaint was heard; so that it is by inference only the Court can col-

lect that the complaint was heard.

And further (as a second part of the same objection), it only states, "on the hearing of the said complaint, upon his " oath aforesaid, before the Lord Chancellor;" by which it appears that the Lord Chancellor had administered the oath. but not that he had heard the complaint. As the words " before the Lord Chancellor" refer to these immediately preceding, "upon his oath aforesaid," and not to "the hear-" ing of the said complaint," it cannot be collected even by inference that the perjury was committed before the Lord Chancellor on hearing the complaint. Vaux's case, 4 Co. 44. 5 Co. 120, 2. Long's case.

2dly, It adds, by way of innuendo, to the defendant's oath, "his house situate in the Haymarket, in St. Martin in the " Fields;" without stating by any averment, recital, or introductory matter, that he had a house in the Haymarket; or even admitting him to have such a house, that his oath was of and concerning the said house so situated. As it is the business of an innuendo to explain, but not to extend, the sense, this innuendo is void, because there is nothing antecedent to which it can be referred. Rex v. Alderton, Sayer 280. Rex v. Matthews, 9 St. Tr. 682. R. v. Horne, Cowp. 672.

4 Co. 17.

3dly, (Which objection is to the first assignment of perjury) Whenever perjury is assigned, it must be a falsification of the defendant's oath. His oath is, "that he was arrest-"ed before he had been within his own house:" to contradict this, the assignment states, "that he had been at his" house," which is consistent; for he might have been on the steps of his house.

4thly, (Which objection goes to the second assignment of perjury,) The defendant swore that he was arrested "upon; "the steps of his own door;" and the innuendo introduces

a new idea not warranted by any introductory matter, viz. the puter door of his house.

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5thly, To both the assignments of perjury they have added Tie Kive time to the defendant's oath, and made it of the essence of it. Wherever time is part of the issue to be tried, it must be positively averred, and not introduced under a videlicet. Wherever time is put under a videlicet, it cannot be traversed. It is stated that Aylett was arrested by Lenard, after hearing a cause in Chancery, to wit, on the 4th of August. Time is also mentioned in the innuendos, when there is not a word of time in the defendant's oath; non constat, therefore, but that he was speaking of the 3d day of August. Rex v. Greepe, 1 Salk. 513. 1 Lord Raym. 256, 2 Inst. 318. 3 Inst. 230.

6thly, The perjury is said to have been committed "of and " concerning the said complaint," without saying that such a complaint existed: but it ought to have been "of and con-" cerning the premises." Cro. Jac. 19. Cro. Eliz. 148.

Rex v. Tuchin, 5 St. Tr. 527.

Bearcroft, Cowper, and Silvester, against the rule, insisted, that drawing indictments for perjury was rendered more easy than it was formerly by 23 Geo. 2. c. 11. and that the Court would not now listen to so many trivial objections as before that statute. [The Court however were of opinion, that the statute did not apply to the present case, it being only intended to obviate the difficulties in stating the whole record of the trial, on which the perjury had been committed; and they said it would have been sufficient, if there had been no statement of the proceedings in the King's Bench.] That no technical expressions were necessary in an indictment for perjury; as in the cases of murder, burglary, Vide Rex v. Wilkes. This indictment need not be more formal than an indictment for a libel. That an indictment for perjury was on the meaning, not on the exact words, of the oath; and if the jury had so found the meaning, the assignments were good in law. That the objections were all made on a supposition of certain omissions in the indictment, which, on a view of the indictment, were found not to be warranted in fact. That barely reading the indictment was an answer to them all. As to the 1st objection, it is clear on the face of the indictment (and not by way of argument or inference), that the complaint was heard; and that it was so heard before the Lord Chancellor. The case cited in support of this objection was 4 Co. 44: but that was an indictment for murder; this for perjury. And with respect

785. respect to the particular point on which the judgment was

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Answer to the 2d objection, that there is no averment that the defendant had a house in the Haymarket, nor any colloquium about it, and that it is first introduced by way of innuendo, whereby the sense is extended. There is no weight in the objection: and it is not like the case of the barn full of corn, for the addition in that case extended the criminality. But it appears out of Aylett's own mouth, from the complaint, from the evidence, and from the oath, that he had a house, which was situate in the Haymarket in the parish of St. Martin in the Fields. The true rule to go by in these cases is that laid down by Lord Ch. De Grey, in the King v. Horne (a); the charge must be such "that the Court may see such "a definite crime, that they may apply the punishment which "the law prescribes."

As to the objection of adding the outer door: it is a legal and admissible innuendo. The oath is, "that he was arrested upon the steps of his own door," and the innuendo explains what door is meant. The defendant's oath must have related to the outer door; for if it had been any other he would not have been entitled to his discharge. This therefore does not come within the principle of the case cited "of the barn full of corn," for the barn "being full of corn" was a new idea; it did not appear in any other part of the indictment, and

was a material addition.

The objection, that time was introduced under a videlicet, is not true in fact. "The 4th of August" is mentioned throughout the whole indictment. Besides no authority has been cited to shew, that wherever a day is under a videlicet, it cannot be taken notice of as the real day. If time be material, it may be proved, though laid under a videlicet: and if immaterial, it's being laid under a videlicet will not render it material. Johnson v. /ickett, E. 25 G. 3. B. R. But in this case, if it be material, it is to be found in other parts of the indictment. And the case of the King and Greepe, cited in support of the objection, was reversed in parliament.

As to the last objection, that the perjury was "of and "concerning the said complaint; this averment, which however is commonly inserted, is not necessary. But if any allegation be necessary, the general one in this case is sufficient. The indictment states that "the jurors aforesaid do "say, that E. Aylett, at and upon the said hearings of the

(a) Cowp. 628.

" said complaint upon his oath aforesaid, before, &c. in " manner and form aforesaid (which refers to every thing pre-"vious to those words), did commit wilful and corrupt per. The King "iurv." They also cited 2 Hale's P. C. 193.

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On the whole, the meaning of the several words having been found by the jury, it was no longer in the defendant's power to say they did not bear that construction.

Erskine, Mingay, Fielding and Garrow, in support of the rule, went over the same grounds of objection, which Ersline made in obtaining it. During the argument the Court observed that Long's case in 5 Co. was considerably shaken in 2 Lord Raym. 1169: and that Vaux's case had also been shaken. Vide Ventr. 23. 3 Keble 51. (a)

Lord MANSFIELD, Ch. J. After all the pains that have been taken, no precedents have been cited on indictments for perjury applicable in point to this case, or to the objections which arise out of it: much less any series of determinations to prevent us from reasoning and deciding this case on the principles of law.

It is necessary in every crime that the indictment charge it with certainty and precision to be understood by every body, alledging all the requisites which constitute the offence: but every crime stands on its own circumstances, and

has peculiar rules.

In the case of perjury, I take the circumstances requisite to be these; the oath must be taken in a judicial proceeding, before a competent jurisdiction; and it must be material to the question depending. If there be any doubt on the words of the oath, which can be made more clear and precise by a reference to former matter, that may be supplied by an innuen-There must be an allegation of time and place, which are sometimes material and necessary, and sometimes not. As to the first constituent part, that it does not appear that the oath was taken in a judicial proceeding, or that it was heard before the Lord Chancellor, and therefore that a material part is wanting; I agree with Mr. Bearcroft, that there is no other answer necessary, than to read the record. words can make a proposition clear, they are here used. Consider the nature of the proceedings on which this perjury was committed: it was a complaint personally made to the Lord Chancellor sitting in the Court of Chancery, not by bill, but ore tenus. It was a complaint of an arrest by a solicitor taken in returning home after the cause was heard, during which time he was privileged. And this is a well known privilege, to which even witnesses in a cause are entitled. This

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This complaint was made to the Lord Chancellor, and the defendant appeared before him to be examined touching the The King said complaint then and there to be heard. On the hearing of the said complaint before the said Lord Thurlow, a question arose, which is stated to be a material question. Then it goes on to state, that, at and upon the hearing of the said complaint, the defendant appeared and was sworn before the said Lord Thurlow, who had a sufficient authority to administer an oath. Then it repeats that at and upon the hearing of the gaid complaint before the said Lord Thurlow, having authority to hear the said complaint, and to administer the oath, the desendant deposed, &c. I protest I cannot comprehend words more expressive. The act of hearing was the defendant's deposition: there was no other cause to be heard; hearing him swear was hearing the complaint; his own oath was the complaint; there was no other party to it on this record; it was a summary proceeding, on which he was examined on oath. No authority has been cited to support the objection, and there is nothing in reason to warrant it.

The next point is, as to the innuendo. Now the business of an innuendo is, by a reference to preceding matter, to fix more precisely the meaning of it. The complaint was, that he was taken before he got to his own house in St. Martin in the Fields. Now what was the material question? The complaint cannot be distinguished from the material ques-The material question is the gist of that which he swore. His house in the Haymarket in St. Martin in the Fields is not another house; but it is a more particular description of the same house. It was not a question put to him in these words. He was examined—then what was the materiality? That he was taken before he got to his house in the Haymarket. Then he swore he was taken before he got home. Where is that? His house is explained, by a refer-

ence to what goes before, to be in the Haymarket.

The next objection is that the outer door is added by way of innuendo. There was no occasion for the innuendo. What is his door, but the outer one, as to the defendant's purpose? If he spoke of an inner door, that would not enti-

tle him to his privilege.

As to the objection of the time—throughout the whole of the record it is laid to be on the 4th of August; sometimes with a videlicet, and sometimes without. The cause was heard on the 4th of August; the complaint was made and heard on the 4th of August; and the defendant swore on the 4th of August. If the time be material, it must have been

been proved; and if not, it may be rejected, as it is laid under a videlicet.

I am of opinion that the rule for arresting this judgment THE KING should be discharged.

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The three other judges delivered their opinions very fully to the same effect.

Rule discharged.

## JACKSON against The Inhabitants of CALESWORTH.

[N this action, which was grounded on the 9 Geo. 1. c. 22. A party for setting fire to the plaintiff's house, damages to the a-grieved is mount of 1911, were recovered. And a rule having been ob-costs (e) in tained, calling on the defendants to shew cause why the costs an action on of this action should not be taxed. 9 G. 1. c. 22.

Plumer shewed cause and contended, First, that no costs against the are due under this act.

although

Costs are only due by act of parliament; none being re-they, togecoverable at common law: and the only statute which gives ther with them is that of Gloucester (a), which is only applicable to the damathose cases where damages could be recovered before it pas-ceed 200% sed. Pilford's case, 10 Co. 115. b. In this case, setting fire to the plaintiff's house amounted to arson at the common law, and he could not have recovered any damages previous to the passing of the 9 G. 1. which gives him this remedy; the civil injury being merged in the felony. If therefore the doctrine laid down in Pilford's case be law, the plaintiff is not entitled to costs. 2 Inst. 289. Gilb. History of the C. Pleas. 268. Bull. N. P. 328. In Witham v. Hill and others (b). which was an action on the statute 1 Geo. 1. c. 5. s. 6. for demolishing houses, &c. Pilford's case is recognized as law r and the plaintiffs there recovered costs, because the stat. I Geo. 1. did not create damages; "the party injured being en-" titled to damages against the particular persons who pulled "down his house, at common law." This distinction is further exemplified in an action of waste, where if it be brought against tenant for life or years, the plaintiff shall recover the place wasted, but no costs; no damages being recoverable at common law; but are given by a statute subsequent to the statate of Gloucester. But it it be brought against a guardian, or tenant in dower, there the plaintiff shall recover costs, because an action lay against them at common law. 9 Hen. 6.

(o) 2 Wils. 91. (c) So in an action against a gaoler on the babeas corpus act. H. Bl. Rep. G. B. 10.

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66. b. 19 Hen. 6: 32. a. The same doctrine holds in quare inpedit, where damages are given by a subsequent statute (a). 2 Inst. 362. 27 Hen. 6. 10. 2 Hen. 4. 17. The only case, which at first appears to vary from this principle, is an action bitants of on the statute of hue and cry for robbery against the hundred. where costs are due: but even in that case, at common law there was an obligation on the hundred to keep watch and ward; and therefore damages were recoverable against the hundred.

> [The Court seemed inclined to think that no such action against the hundred would have lain for not keeping watch and ward before the statute; they not being a corporation.]

In 2 Wils. 92. Mr. J. Bathurst said "that the statute of . " hue and cry did not create damages, but only gave the " party robbed a different remedy from that which he had " before, for the party robbed before that statute might have "had an action against the hundred for not keeping watch " and ward (b)."

In 3 Burr. 1723, there is a case on this very statute, in which the plaintiff was nonsuited; and on the Master's doubting whether the defendant were entitled to the costs of the nonsuit, it was brought before the Court, where it was taken for granted that the plaintiff, if he had succeeded, would have been entitled to costs, and as it was reciprocal, the Court thought he should be liable to pay costs. But in that case the point did not come directly in question; and it cannot now be considered as any authority, it having been since shaken in the case of Wilkinson qui tam v. Allot (c). But

2dly. If the Court should be of opinion that any costs are due, the act of parliament having limited the sum to 200%. and the damages here being 1911. such costs and damages

taken together should not exceed 2001. in the whole.

This matter stood over on account of other business, and

afterwards the Court stopped the other side, and

WILLES, J. said, this point, on looking into the books. appears to have been determined. Pilford's case is the only one which bears the other way, which Lord Ch. J. Willes seemed strongly inclined to over-rule in the case in Wilson (d). It has been the constant usage to give costs in actions on the statute of hue and cry. And wherever damages are given, costs ought to follow of course.

BULLER, J. Lord Coke in his second Institute (e) lays down a rule different from that in Pilford's case; for he says " This

<sup>(</sup>a) Westm. 2. c. 5. (c) Gowp. 366.

<sup>(</sup>b) Russel v. The men of Devon, post. 2 vol. 670. (d) 2 Wile, 92. (e) 2 Inst. 289.

"This clause (speaking of the statute of Gloucester) doth 1785. "extend to give costs, where damages are given to any de-" fendant or plaintiff by any statute made after this parlia-" ment."

Jackson againet The Inhabitants of CALES-WORTH:

And I doubt whether such an action against the hundred as that mentioned by Mr. J. Bathurst has ever been brought. Rule absolute (a).

(a) Salt. 206.

# YATES against HALL:

THE declaration stated that at the time of the capture A promise thereafter mentioned, to wit, on the 29th May 1780, by a captain there was an open war between Great Britain and the United behalf of States of North America. That, at that time, the plaintiff his owners, was a seaman on board a sloop called the Saville, the proper-when the was a seaman on board a sloop called the Savine, the property of the defendant, at the wages of 41. per month. That ken to pay on the said day, &c. one Edward Macatter, a subject of the monthly United States of North America, and commander of the Bluck wages to Princess Cutter, captured the Saville. That in consideration one of the that the plaintiff, at the request of the defendant, would be-order to income one of the hostages of the said Edward Matatter, for duce him to securing the payment of a large sum of money, agreed by become a the master of the Saville to be paid for the ransom thereof, binding on with her cargo, the defendant promised to pay him the like the owners wages of 41 per month for every month that he should be although detained as such hostage. That the plaintiff, confiding in the they aband defendant's promise, became one of the hostages, &c. and ship and was detained in custody as such hostage for three years and cargo; ten months; by reason whereof, &c. the defendant became liable to pay to the plaintiff 1844., Sc. The defendant pleaded the general issue.

This action was tried at the sittings after Hilary Term hast, before Lord Mansfield at Guildhall, when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:

" That the Saville was on the 29th May 1780 captured on "a voyage from Guernsey to Liverpool by the Black Princess " Privateer. Ethward Macatter commander, belonging to the "United States of North America, and ransomed for 40001. "and the following ransom bill given, &c. (prout). That "to induce the plaintiff to consent to be a hostage, the cap-" tain agreed with him, and engaged for his owners, that he should be paid wages at the rate of 4% per month, so long as he was detained a hostage; to which the plaintiff consent-VOL. I.

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"ed; and, in consequence thereof, he was detained as a hos"tage till the 27th August 1783. The defendants, owners
"of the ship, disputed the payment of the ransom bill, as
"being more than the value of the ship and cargo, which
"occasioned a suit to be brought in the name of the hostages
"in the High Court of Admiralty of England against the de"fendant, to compel the payment thereof; which suit was
"dismissed. That an appeal was brought to the High Court
"of Delegates against the said judgment; and the said judg"ment was, by the Court of Delegates, affirmed (prout,
"&c.). That the net proceeds of the ship and cargo were
"paid to the captors in the 13th August 1783. The question
"for the opinion of the Court is, Whether the plaintiff be
"entitled to recover in this action?"

This case was argued in last Easter Term, when Knowles for the plaint if contended, that the hostage's consent was necessary to his being a party to the ransom bill; therefore it was a fresh contract, independent of his original one. That he laboured under many disadvantages, which, as a common prisoner, he would not be liable to; for he must remain in custody till the ransom bill was paid. That there are many determinations, which hold that a captain may bind his owners by contracts for their benefit. That it is laid down by Lord Mannfield in Cowper, 290, " That, where a "man is under a legal or equitable obligation to pay, the "law implies a promise, though none was ever made." That the plaintiff could not know that the ransom bill meant to bind the owners for more than the value of the ship and cargo. That, at all events, he was still an hostage for the real value of the ship, and liable to be detained till that value was paid.

Ridley, for the defendant, insisted that, from the moment the ship was captured, wages ceased. That the captain had exceeded his authority; and had no right to bind his owners beyond the value of the ship. 1 Molloy, b. 2. c. 1. s. 10.

The Court took time to consider. And now, in the present Michaelmas Term, the Court gave judgment; having deferred it so long on account of a difference of opinion.

WILLES, J. This is a very hard case; the action ought to be supported if possible. The plaintiff became a hostage at 41. per month. This contract was then supposed to be for the benefit of the owner; and there is no fraud on the part of the captain. The plaintiff was not compellable to become a hostage, but voluntarily engaged himself. He continued a prisoner for above three years: the net produce of the ship and cargo was not paid to the captors till 1783; for the cause by the captors in the name of the hostages was not decided

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decided in the Admiralty Court till that time, till when he was not entitled to his discharge. The Admiralty Court thought that the captor could not recover more than the vahe of the ship and cargo, because, by the civil law, the delivery of the ship and cargo is a discharge of the ransom bill, and of the hostage, who is only a security that the ransom bill shall be paid. But this contract of the captain is a collateral one, in which he has stipulated for himself and his owners. I do not say that in every case the captain can bind his owners beyond the value of the ship and cargo, for if he could he might ruin them at any time: but I think there are some instances where he can, and I think this is one. Lord Mansfield's words, reported in Cowper, 639, are very strong. Vide Molloy, vol. 1. lib. 2. c. 1. s. 10. The owner shall answer the act of the master generally; but if he take up money beyond what is necessary, the owner shall not be bound, but the master himself. I will put this case; suppose a ship be driven into a foreign port, and a thorough repair begame necessary, that the master directed such a repair, which amounted to more than the value of the ship; in that case would not the owners be liable? I think they would. I will but another case; suppose the ship and cargo had been sold for half their value only, by a fall in the market, would not the owners have been still liable, and could not the plaintiff have recovered? I have no doubt of it. This is a bona fide contract; and under all the circumstances this is a reasonable engagement of the master's, with a view to benefit the owners; and I think the plaintiff is entitled to recover.

Ashmurst, J. We are not to consider whether it were expedient or not to enter into this contract. The master was the only person at the time who had a right to decide; the owners had entrusted the ship to his management; he was their agent, and thought he was acting for their advantage when he ransomed the vessel. It was necessary that a hostage should be given, and the master had no right to throw the onus on any of the crew against their will. To induce the plaintiff to become so, the captain entered into this contract. The plaintiff considered that the captain was bound by it; then is it valid and binding in law? As a general position, it is clear that the owners are bound by the contract of the master: this may be collected from the 7 Geo. 2. 15. which was provided for the security of the owner in the case of embezzlements. Before that statute, owners were liable for the embezzlement of the master or mariners to any amount. Then it would be strange to say that the owners bafore the statute should be answerable even for the fraud YATES against HALL.

and misbehaviour of the master, and not for his contracts bona fide made. Roccus lays it down as a rule, No. 32. That in all cases owners are bound by the contracts of the master. But it has been contended that owners are not bound beyond the value of the ship and cargo; but there is no authority that I know of to warrant this position to such There are only two exceptions to the general rule, that the owner is bound. One is in the case of hypothecation, the other in the case of a ransom bill. As to the first, in truth the owner is not bound at all, the lender knows nothing of the owner, he gives credit to the ship only; from the form of the contract, he cannot go beyond the value of the ship, 6 Mod. 79, 1 Salk. 35. As to the ransom bill, it was determined in the case of Helly and Grant, Trin. 23 G. 3. that the owners were not liable beyond the value of the ship and cargo. I was not present when that case was decided, but I do not mean to dissent from the determination. In transactions of this kind between persons of different states, it is for the honour of nations that these contracts should be invariably performed. The captor has it in his power to use the crew in what manner he pleases; they have the idea of liberty before their eyes, and would probably make any agreement to be free, and therefore would not hesitate to contract beyond the value of the ship and cargo, to the ruin of the owners. But as it is, no one can be hurt: the owners cannot, because they have the liberty of abandoning their ship altogether; the captors cannot, because they receive the ship and cargo. Then if this case has nothing to do with hypothecation or ransom bill, it is a mere case of contract. The consideration at the time was ostensibly for the benefit of the owners; the master was entrusted with the ship and all its concerns; he judged it to be for their benefit, and the hostage regarded the captain as a person competent to engage for his owners, and could not tell that it was not for their advantage. It is a good consideration, if it either import to be a benefit to the person for whom the thing is done, or a loss to the party who does Here it was for the benefit of the owners. Is there any thing in the nature of the contract which should prevent the owners from being personally liable? In actions for wages they are clearly liable, and no questions about the value of the ship are ever asked. This contract being subsequent to the capture, is totally unconnected with any question about the loss of wages on account of the loss of the ship. Upon the whole, as this was a proper subject of contract, as the consideration

consideration was meritorious, as it was made by a person having a competent authority to contract, as there was no collusion between the parties, and the sailor entered into the contract on the faith of the person, and not of the ship, there is nothing in justice, reason, or law, to prevent the plaintiff recovering.

YATES against HALL.

recovering. BULLER, J. (after stating the facts). This is an action against the owner of the ship; and therefore it is quite unpecessary to determine whether the consideration for the promise made by the captain be sufficient in point of law to maintain it, unless the captain had a power to bind his owner by such promise. In order to prove that the captain had such a power, it was argued by the counsel for the plaintiff, that the captain can bind the owner by contracts made for his benefit. I agree in that position, and think the counsel stated it accurately. The question then is, whether this contract were for the benefit of the owner? The contract was made in order to obtain a ransom of the defendant's ship; but the ransom was for more than the value of the ship and cargo. That ransom was not for the benefit of the owner; for it effectually deprived him of his whole property both in the ship and the cargo: and if the ransom itself were not for the benefit of the owner, no additional charge thrown upon him on account of the ransom could make it so. I he captain has not by law a power of binding the owners beyond the value of the ship and cargo. chants would be in a most deplorable situation if that power were extended; for it would be to put it in the power of the captain to involve his owners in the most certain ruin. It would be, as Lord Nottingham said in a case before him, 29 Car. 21 (a), to make masters the owners of all men's ships and estates. In 1 Sid. 411. it is stated as the custom to repair ships upon the credit of their bottoms; as ships are liable for their repairs, but not the owners without their assent, so as to charge their persons. The merchant trusts the captain with the ship and cargo. As far as they go, the captain has a power of binding his owners, and he may hypothecate the ship; but that only in case of necessity, in a foreign port, and not for his own debt. Lex Mercat. 95, 6. If he borrow money to repair or victual the ship when there is no occasion for it, he alone is debtor, and not the owners. Lex Mercat. 53. Molloy, 315. s. 10. Hob. 11, 12. and Moor, 918. If the repairs exceed the value of the ship, I think

(e) 2 Cb. Cas. 238.

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the owners have a right to abandon her, and discharge themselves; for the merchant trusts the captain no farther than with the value of the ship; and therefore the captain cannot bind the merchant farther. And the creditor, when he advances his money, has two securities, and only two, viz. the body of the ship and the person of the master. It is only in respect of the ship, that the master can bind the owner. If the owner keep the ship, he keeps her subject to the charge the master has brought upon her. If he relinquish the ship, he is not liable to the charge. His keeping the ship is proof of his assent, and so brings him within the rule stated in Sidersin. But when he abandons her, the case, with respect to him, is the same to all intents and purposes, as if she never had been ransomed at all. The Legislature saw the mischief of suffering captains or masters to bind their owners to any extent, in so strong a light, that even in cases where the owners trust the captains with the care and custody of other persons' goods, they in the 7th year of Geo. 2. passed an act to provide that owners of ships should not be liable beyond the value of the ship and freight for embezzlements committed without their knowledges. This act was made in consequence of the case of Boucher v. Lawson (a), where the goods were lost by the negligence or embezziement of the master, and the master was entitled to the freight of those goods for his own benefit, and the action was brought against the owners. The Court thought that case was not to be distinguished from the common case of the carrier, and that the owner was liable for the act of the master where he acted within the compass of his employment. But where a master ransoms a ship for more than her value, he acts within no compass, no bounds at all. I agree that at common law the owners were liable for the full value of goods shipped on board their vessels; for they were in all respects rightly considered as common carriers. But it was only in respect of the general obligation, which the law by its positive rules throws on carriers, that they are liable to that extent. But that does not at all apply to the present case. My proposition is, that the owners are not liable for the act of the master farther than they trust him. When they trust him with the carriage of goods for hire, they trust him to the extent of the value of those goods: and for his default they are liable to that extent to the owner of the goods, but no farther. If the waggoner chose to em-

YATES against

ploy a number of persons to guard his waggon, I know of no law or reason which could compel the owner to pay that charge. If a captain of a ship chose to contract with two or three privateers to guard him against an enemy during a voyage, there is no foundation for charging the owners on such a contract; not even though it should appear that enemies infested the sea, and that there was danger in the voyage. But, without having recourse to possible or imaginary cases, in which the injustice of binding the owners by the contracts of the master to any extent is glaring, it seems to me that all the adjudged cases on the subject decide, or at least imply, that they cannot be liable beyond the value of the interest with which they trust the master.

It has been said that if the ship be ransomed, and proceed on her voyage, the sailors will be entitled to their wages and the owners bound to pay them. No authority has been cited to support that position, and the general rule of law is, that if the ship be captured, the wages are lost. 2 Lord Raym. 1212. The ransom is a new purchase of the ship : and it will deserve great consideration before it is determined that after a ransom the owners shall be liable to pay wages for the time which elapsed before the capture. If the sailors should be entitled to wages for the remainder of the voyage (which has not yet been determined) that right must be founded purely upon equity; and then to bind the owners personally, I think it would be incumbent on them to shew that the owners had accepted and taken the ship; for unless the owners do that, the ship, as far as they are concerned, is to be considered as if she were never ransomed at all. The owners have the election after a ransom to take the ship or to abandon her.

In Tranter v. Watson (a), which was a motion for a prohibition to a suit in the admiralty against the ship and goods by the captain who had ransomed her and was himself a hostage, there was not the least idea of binding the owners beyond the value of the ship and cargo: and the suit was against the property only, and not against the owners. And in Johnson v. Shippen (b), where the ship was hypothecated for money laid out on necessaries, and a libel preferred against the ship and owners to compel the payment of the money, a prohibition was moved for, Holt, Ch. J. said the master has no authority to sell any part of the ship, and his sale transfers no property; but he may hypothecate. And since the proceedings in the admiralty are against the owners

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YATES against

as well as against the ship, let a prohibition go quoud the proceedings against the owners, and let them go on to condemn the ship.

In Helley v. Grant (a) Lord Mansfield said he did not recollect any case, where the ransom was for more than the value of the ship; but in such a case he thought it equitable to say that the captain had exceeded his authority, and that the parties had gone upon a mistake: but the consequence is, that the ship and cargo must be restored. If they be delivered up in lieu of the ransom bill, that is an indemnity.

In the case of Graham and Tutes v. Hall, before the delegates on the 3d of July 1783, the judge of the admiralty first held, and on appeal four civilians and three judges unas nimously, determined, that the captain could not bind his owners beyond the value of the ship and cargo; and the owners having abandoned the ship and cargo, the court dismissed the suit which was brought by the hostages against the owners. That suit was between the parties to this cause, and was on the very ransom now under consideration; for the present plaintiff and the other hostage brought their suit in the admiralty court to compel the defendant, as owner of this ship, The Saville, to redeem them by paying the full amount of the ransom bill. But the court of admiralty, and the court of appeal, held, that by the delivery up of the ship and cargo, the owners were discharged. The money arising from the sale of the ship and cargo was then in the admiralty, and all the doctors agreed that their court would not suffer the money to be taken out till the hostages were released; and that the court of admiralty in France, on having proof that the money was in our court of admiralty, would order the hostages to be released.

The power, contended for in this case, is dangerous to the last degree; for after a capture, unless the ship can be ransomed on reasonable terms, the personal interest of the captain leads him to betray his owners. He is concerned only in getting his liberty; and whatever the terms of obtaining that liberty may be, provided he can throw the burthen on his owners, it is of little import to him. It is hardly possible, and highly improbable, that a master can ever ransom a ship for more than its value, without knowing that it is so. If he do know it, he is guilty of a fraud in attempting to bind his owners beyond the value: and it is no answer to say that the captain understood that the ransom was for the benefit of the owners, if in fact it were not so.

The

# IN THE TWENTY-SIXTH YEAR OF GEORGE III.

The power of the master or captain must be founded on some rule of law, and that rule of law must have some certain bounds. The rule must be either that he has a general right to bind his owners by all contracts respecting the ship, or that he can only bind them by such contracts as are for their benefit, not exceeding the value of the ship. A general and unlimited power is contradicted by every law-book on the subject. If it were allowed, and the captain borrowed ten times the value of the ship, the owners ought to be answerable. But let him borrow what he will, if the owner abandon the ship, he is no longer answerable. If the power be confined to contracts for the benefit of the owner, this contract was not for his benefit, and therefore cannot bind him.

I have considered this contract with the plaintiff as part of the contract for the ransom; for it arises out of it, was connected with it, and, if the plaintiff were not compellable to become a hostage, was necessary for obtaining the ransom; and if the owners cannot be bound beyond the value directly, that is, by the ransom bill, I cannot conceive that they may be bound beyond the value indirectly, or by contracts made with other persons, for the purpose of completing the ransom.

If this promise be considered as a distinct contract, and unconnected with the ransom, I think the case is still stronger against the plaintiff; for then the question will be, whether the master, by contracts not relative to the ship, unattended with the smallest advantage to the owner, but made for the master's own convenience and advantage, can bind his owners. If that can be supported, by the same reason, if a ship be captured, and not ransomed, and the master promise to pay wages to all the sailors whilst they are prisoners, the owner must be bound by his promise.

It is a hardship on the sailors that they must suffer by the events of war, in consequence of their being in the owner's service: but it is a calamity which must be borne by all on whom it falls. The owner suffers by the loss of his property; the sailors by the loss of their liberty. The law cannot guard against the hardships attendant on such an accident: it founds no system upon it, nor affords any relief on that ground. But all arguments on the hardship of a case, either on one side or the other, must be rejected, when we are pronouncing what the law is; for such arguments are only quicksands in the law, and, if indulged, will soon swallow up every principle of it. Besides, if it could avail in this case, I think it would weigh in favour of the owner; for having Vol. I.

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### CASES IN MICHAELMAS TERM,

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lost the whole of his property, he ought not to have any farther burden thrown upon him on account of it; therefore I am of opinion that the plaintiff cannot recover.

Lord MANSFIELD, Ch. J. I have thought much upon this subject, and I have not been able to make up my mind to say, that the plaintiff ought not to recover. The contract was a fair, honest, and just contract at the time: it was only an agreement that, if a man would become a hostage, he should have his common wages for his maintenance; and this is totally collateral to the contract about the prize; it is The plaintiff was privy to no independent of the ransom. fraud; he knew nothing of the value of the ship; but he only consented to become a prisoner, on condition of the ship's being restored. By the law of nations the captain has a power to ransom. This is for the benefit of the owners: but it has been doubted whether it be for the benefit of the public; and it is now taken away by act of parliament in England (a). As between the captors and the owners, the captain had a power as far as the value of the ship and cargo, which value may be diminished various ways; but that by no means affects the present plaintiff, who has been a prisoner all this time. There is no case like this in the civil law, or in the law of England; and, without any authority, I should be very loath to say, that this sailor, who has been the means of obtaining the liberty of the rest of the crew, should not receive his wages; and I have not been able to bring myself to say that upon principle he shall not recover.

Judgment for the plaintiff.

(a) 22 Geo. 3. c 25.

## BUXTON and Another against MARDIN.

HE defendant, being indebted to the plaintiffs in A general 2061. 4s. on the 8th June 1769 executed a bond and judgment signed by warrant of attorney for payment thereof. On the 28th May wir ue of a 1772 he was discharged under an insolvent act of the 12 warrant of No proceedings were had against him on this Geo. 3. c. 23. attorney given before bond and warrant of attorney till Trinity Term 1785, when the passing judgment was entered up on the bond and warrant of attor. vent act, of ney : which the

described to take advantage by pleading in discharge of his person, &c. will no warrant a special execution under the act. But the Court will give the plaintiff leave to please the insolvent act for the described and sign a special judgment under it; for the warrant of attorney will preclude the desendant from saying there is no debt.

ney; on which a fieri facius issued, directed to the sheriff of Middlesex to levy of the defendant's goods (except the necessary wearing apparel and hedding of himself and family, and the working tools and implements necessary for his trade, not exceeding 201. in the whole) as well a debt of 4121. 81. 43 also 53 shillings costs.

BUXTON against MARDIN.

Marshal had obtained a rule to shew cause why the judgment in this cause should not be set aside, and the writ of fi. fa. executed thereon; and we grounded his motion on the 34th and 35th sections of the 12 Geo. 3.; the first of which declares, "that the future effects of insolvents (except clothes and tools, of the value of 20l.) are to be liable as before the act; and that any creditor may at any time hereafter sue out execution on any judgment at the time of the act recovered, but not against his person. &c." The latter clause provides, "that any creditor may, at any time after the insolvent's discharge, commence and prosecute any action or suit against the prisoner or fugitive for any sum due at "the time of his discharge."

This, it had been contended, was neither a judgment recovered at the time of the act, nor a judgment obtained on an action commenced and prosecuted since the act.

Gibbs was prepared to shew cause: but

BULLER, J. observed, that this was a special execution taken out on a general judgment. That if the defendant chose to avail himself of this act of parliament, he must do it by pleading it, when the judgment must be special: and if he do not plead his insolvency, the judgment must be general. But, at all events, the execution must follow the judgment. Here the defendant had no opportunity of pleading this act. If the judgment had been entered generally against the defendant before his discharge, no special execution could be taken out on that, without first suing out a scire facias.

Gibbs said, there was a difference between a warrant of attorney to confess a judgment, and an action in the usual way. In the former case, when a man confesses a judgment, he waves all benefit of his plea, by declaring to the plaintiff he will plead nothing: and this is like that case; for the de-

fendant waves his right of pleading the act.

BULLER, J. Wherever a man neglects to take advantage of any defence which he has at the time, he waves it: but here he had not a defence at the time of giving the warrant of attorney.

Аs

## CASES IN MICHAELMAS TERM,

BUNT IN against MARDIN.

As this point was not the foundation of the motion, the counsel were desired to look farther into it. Afterwards,

Gibbs against the rule. If it be true that the defendant was discharged under the insolvent act, he has no reason to complain; for the execution is only against the goods warranted by the act; and if he were not discharged, he has less reason to complain; for it was for his benefit to have the execution special. As to a scire facias, the act of parliament dispenses with it; for it says, "that a creditor may, at any "time hereafter, sue out execution, &c. on a judgment re-"covered." This is an execution on a judgment recovered. (Per. Cur. There was no judgment at the time.) This was the same thing; for the defendant had given a warrant of attorney to confess a judgment; and if any judgment could be entered up under that warrant of attorney, it must be gene-Even supposing the proceedings were irregular, it is not pretended that the debt is not a fair one; that the defendant did not give the warrant of attorney; that under the execution the things excepted in the statute were taken. This then is only a bare irregularity, which was not the ground on which the defendant applied to the Court. wherever a party comes against the justice of the case merely to complain of an irregularity, the Court will not relieve him, unless he come in the first instance.

Marshal, in support of the rule, submitted three proposi-

tions to the Court.

1st, That a judgment, entered under a power of attorney, must be warranted by that power; and consequently that a general power only warrants a general judgment.

2dly, Since the act of 12 Geo. 3. a general judgment cannot be entered against an insolvent, unless by his own acqui-

escence.

adly, A discharge under an insolvent act is a countermand

of a power of attorney.

In support of the first, he cited Co. Lit. 112. 181. 258. 1 Mod. 1. 1 Salk. 399. . 3 Burr. 1471. He was then stopped by

Lord Mansfield, who said, It is clear the judgment is wrong, as it cannot be entered up generally by virtue of the power of attorney since the act, without giving the defendant an opportunity of pleading in discharge of his person. But the warrant of attorney is conclusive in another action on it.

Buller.

Buller, J. This warrant of attorney will preclude the defendant from saying there is no debt: but the statute has given a defence as to his person and wearing apparel, &c. and that must be put on record before judgment. Now, if a scire facias had been brought on that judgment, the defendant could only have pleaded matter so bequent to it; so that the defendant had no way whatever of availing himself of the privilege of the act but by pleading. The plaintiff, perhaps on an application to the Court, would be permitted to plead the act for him. This judgment is wrong, and must be set aside.

BUXTON
against
MARDIN.

Rule absolute.

Gibbs then obtained a rule to shew cause why the plaintiff should not be at liberty to enter a plea under the insolvent act for the defendant, and take his judgment under the statute; and the Court recommended it to the defendant's counsel not to object to it.

### The KING against JENKINSON.

THE defendant, having been convicted before two jus-No costs are tices in a penalty under the lottery act, removed the due on a proceedings into this court by certiorari. On an application certiorari, to the Master to tax the costs of the certiorari, he had doubt-summary ed whether he had a power to do so; on which a motion was proceedings, made for the direction of the court to the Master to tax them. unless a re-

Plumer against the rule. The general rule is, that where cognizance be entered there is no recognizance on removing summary proceedings, into at the there are no costs. Here the defendant, on removing these time of reproceedings, entered into no recognizance: and the Court moving the proceedings. The proceedings are no power to tax costs in this case under the statutes re
But it is disconnected.

specting costs in criminal proceedings.

Sylvester in support of the rule. The costs applied for are in the court those of removing the proceedings by certiorari, and not the whether they will costs before the magistrates. The conviction below was grant a certisht and proper; and this court has since confirmed it. If they will to costs are allowed, all the convictions under this act would in fature, they will compel the convictions under the act would be compel the convictions.

c due on a netriorari, removing summary s proceedings, a unless a rece cognizance be entered into at the etime of removing the proceedings. But it is discretionary e in the court whether they will sprant a cept fitorari; and d in fature,

He ter into a recognizance:

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#### CASES IN MICHAELMAS TERM, &c.

He then cited the King v. Bush, B. R. E. 20 Geo. 3. and insisted that the Court had a power to order the costs to be The King taxed under the 13 Geo. 2. c. 18.

against Jenkinson. neither receives nor pays costs. We are aware of the mischiefs of granting certioraris for vexatious purposes; and it is discretionary in the Court whether they will grant them or not. For the future, we will oblige the party applying for a certiorari to enter into a recognizance to pay costs: but we are not authorized to grant them by the 13 Geo. 2. c. 18. without a recognizance.

Rule discharged.

END OF MICHAELMAS TERM.

# CASES

#### ARGUED AND DETERMINED

IN THE

# COURT OF KING's BENCH,

#### HILARY TERM,

IN THE TWENTY-SIXTH YEAR OF THE REIGN OF GEORGE III.

1786.

SHELDON Executor of SHELDON against BAKER.

Jan. 25th.

N a motion by Law to discharge the defendant on filing An execucommon bail, on the insufficiency of the affidavit on tor, in his which he had been held to special bail, it appeared that the affidavit to hold to bail, plaintiff had sworn to the debt as follows:

"W. Sheldon, executor of W. Sheldon, &c. maketh oath, as to bis be-" &c. That the defendant is justly and truly indebted unto lief of the "this deponent as the sole executor of W. Sheldon, his late "father deceased, in 1000% and upwards, for money had and

" received by the defendant, as receiver of the rents and pro-" fits of the said W. Sheldon deceased, as appears to this de-" ponent to be the true balance upon the said f. Baker's stew-

" ardship account, by him delivered to this deponent, as executor " of the said W. Sheldon, and from the several articles of " disbursement therein contained having been carefully ex-" amined with the vouchers, &c."

The objection to this affidavit was, that the plaintiff had not added "that he believed the account to be true." And in support of it was cited Barclay and others, assignees, &c.

against Hunt. 4 Burr. 1992.

Bearcroft,

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SHELDON against BAKER.

Bearcroft, and Baldwin, now shewed cause; and contended, that this case was distinguishable from that cited, because this affidavit was founded on the defendant's own account. That though it did not state in words "that the plaintiff be-"lieved the account to be true," yet in substance it conveyed that meaning; and it was as full as any executor could go, when swearing to the balance of an account delivered in by the defendant himself.

Lord MANSFIELD, Ch. J. The judgment in Barclay and Hunt was given on full consideration; and is decisive of the present question. The plaintiff ought to have added that

he believed the account to be true.

BULLER, J. The general rule is, that there must be a positive affidavit; the cases of assignees, executors, &c. are by way of exception to that rule; then a party claiming under that exception must shew a case where it has been allowed. In those cases, if he swear that he believes it to be true, it is as much as he can do, because the transaction in general does not come within his own knowledge. But there is no case, where the affidavit has been allowed to be sufficient to hold the defendant to special bail, without adding the belief of the party who made it.

Rule absolute (a).

(a) Vide Mackenzie v. Mackenzie, post, 716. Swayne v. Cramond, post, 4 vol. 176. H. Bl. Rep. C. B. 245. and Wheeler v. Copeland, post, 5 vol. 364.

Thursday, Fan. 26th.

## GIST against MASON and Others.

Where a policy does not appear on the face of it to be iliegal, the Court will not grant a new trial in order to let the defendant into proof that it was 50; but he should have shewn it on the trial.

ASE for money had and received, to recover the premiums upon certain policies of insurance under written by the plaintiff. This was tried before Lord Mansfield at the sittings after last Michaelmas Term at Guildhall, when the following facts appeared: That the defendants were West India merchants, and had property in the islands captured by the French last war. That it was a common practice to supply these islands with provisions from Ireland, notwithstanding they were in the hands of an enemy; that the defendants, who acted as their own brokers, had for this purpose employed neutral vessels, and had caused them to be under-written by the plaintiff from different ports in the Continent

How far trading with an enemy is illegal in a subject? Qu. [See Stat. 33 Geo. 3. c. 27.]

1786.

GIST

against

MASON.

Continent to Ireland, thence to Madeira, and St. Thomas; and to all of them was annexed the liberty of going to any

one of the captured islands.

It had been long doubted whether these policies were legal: but in the case of the Bella Judithu (a) whereon a similar policy was effected, the Court were of opinion that the assured could not recover.

The plaintiff in consequence of the above decision had re-

fused to pay where there had been a loss.

The defendant's counsel at the trial contended, that as these voyages were illegal, and as both the parties were in pari delicto, the maxim of law melior est conditio possidentis ought to prevail: but Lord Munsfield, being of opinion that these policies were not illegal on the face of them, directed a verdict for the plaintiff.

Bearcroft now moved for a new trial to let the defendants into evidence to prove that this kind of trading was so notoriously illegal that the plaintiff must have known it to be so; that the reason why this evidence was not offered at the trial was founded on a presumption that the jury of their own knowledge must have concluded that the illegality of these contracts was known to the parties at the time of making them.

Lord MANSFIELD, Ch. J. This, upon the face of it, is the case of a neutral vessel. It is no where laid down that policies on neutral property, though bound to an enemy's port are void. And indeed I know no cases that prohibit even a subject trading with the enemy, except two'; one of which is a short note in Roll. Abr. (b), where trading with Scotland, then in a general state of enmity with this kingdom, was held to be illegal; and the other was a note (which is now burned) which was given to me by Lord Hardwicke, of a reference in king William's time to all the Judges, whether it were a crime at the common law to carry corn to the enemy in time of war; who were of opinion that it was a misdemeanor.

By the maritime law, trading with an enemy is cause of confiscation in a subject, provided he is taken in the act; but this does not extend to a neutral vessel.

Vol. I.

Ashhurst,

(a) Dalmady against Motteux, Mich. 25 Geo. 3. N. B. In that case the Court decided principally upon the ground of an embargo having been laid on (b) 2 Roll. Abr. 173. provisions in Ireland.

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GIST against MASON.

ASHHURST, J. The defendant makes this application to the court in order to supply his own negligence, when it is evident he was not taken by surprise at the trial. If it do not appear on the face of the policy that it is void, it ought to have been shewn by evidence: but no such evidence was offered.

BULLER, J. As to the illegality of the contract being within the knowledge of both parties, such a fact is not to be taken for granted; what passes between two parties can never be such a matter of notoriety as should be left to a jury to presume.

Rule refused (a.)

(a) Vhie 1 Wils. 98. Salk. 653.

Friday, 'Yan. 27th.

#### LUDFORD against BARBER.

THIS was an action of covenant for rent in arrear. A lease ex. ecured by The declaration stated that." Whereas before and at the tenant " the time of the making of the indenture hereinafter menfor life, in " tioned, one John Brucebridge Ludford and the said John which the " Ludford (the plaintiff) were respectively seised of the prereversioner, who was " mises hereinafter mentioned to be demised, (that is to then under " sav.) the said John Bracebridge Ludford in his demeene as age, is named, but " of freehold for term of his life, and the said John Ludford not executed " of the reversion thereof expectant on the determination of the by him, is " said estate of the said John Bracebridge Ludford in his devoid on the death of the " mesne as of fee; and, being so respectively seised, by a cer-" tain indenture made at Nuneaton in the said county of Wartenant for life; and " wick, on the 31st day of January 1770, between the said an execution " John Bracebridge Ludford and the said John Ludford of by the re-" the age of thirteen years, son and heir apparent of the said versioner only after-" John Bracebridge Ludford, of the one part, and the said John Barber of the other part; the said John Brucebridge wards is no of it, so as " Ludford and the said John Ludford for the considerations to bind the " therein mentioned did, and each of them did, according to lessee it an " their several and respective estates and interests therein, deaction of " mise, grant, lease, &c. unto the said John Barber, his excovenint. How for the " ecutors, administrators, and assigns, all those several mines. lessee might " veins, delphs, beds, and lymphs of coal, &c. [particularly have been " describing them; ] to have and to hold the said mines, &c. stopped, if " unto the said John Barber, his executors, administrators. the lessor had not "and assigns, from the 29th September then last past, for himselt "the term of 21 years and 19 years, making together 40 shewn by " years : his acclaration wat the

lease was not executed by the reversioner till after the death of the tenant for life Qu 2 Whether ban stupicy is a plea to an action of covenant for rent Qu?

again**et** 

series; yielding and paying therefore yearly and every 1786.
year for so many years of the said several terms as the said fokn Bracebridge Ludford should live, once in three Ludrond "weeks, if the same should be demanded, or otherwise, as \* the coals, cobbles, and slack in the said indenture after " mentioned, should be sold and disposed of at the will, and "upon the demand, of the said John Bracebridge Ludford " and his assigns during his lifetime, and after his decease in like manner for the remainder of the said terms to the said John Ludford, his heirs and assigns, the sum of one " shilling and six pence as a mine-rent for each and every " load of coals that should be gotten and sold, or converted " into coaks and so sold upon or within the said premises: " Awd Also yielding and paying yearly and every year, &c. "over and above the said mine-rent of 1s. 6d. the same proa portionable yearly rents or sums of money, which the se-" veral tenants or occupiers of the said several farms and " enclosed lands then did or should pay during the terms by \* the said indenture granted, for all such parts of the said " farms and lands as the said John Barber should find necessary to make use of for the better and more effectually " getting and vending the said coals, &c. during so long time as the said John Rurber, his executors, administrators, and assigns, should occupy the same, for the purpose before mentioned." Then followed an express covenant from the lessee, his executors, administrators, and assigns, for the payment of the rents. Then it sated a covenant by the defendant, "That he would work the said colliery in such a manner as in all events to get, sell, and pay rent for, at 44 least 1000 loads of coal in each and every year during the 4 said terms; or in default of so getting and selling 1000 loads "in each year, should and would pay unto the said John "Bracebridge Ludford and his assigns, for so many years of 4 the said terms as he should happen to live, and after his " decease, to the said John Ludford and his assigns, so much "money as together with the mine-rent of 1s. 6d. per load should make up the full sum of 75i. a year, for each and every year; the first of such payments of 75l. per annum "certain rent to commence from such time as the sale of "the dry seven foot coals in Thomas Atkins's [one of the tenants] ground should cease to produce 1001. per annum, " pursuant to an agreement made between the said John Bracebridge Ludford and the said defendant, dated, &c. By virtue of which said demise the said defendant after-"wards, to wit, on 31st of January, in the year afore1786.

againet

" said, entered, &c. and was and still is possessed thereof. " That the said John Bracebridge Ludford afterwards, to wit, LUDFORD "on the 1st March 1776, at Nuneaton aforesaid, died so seis-"ed of the said premises in his demesne as of freehold, for BARBER. "the term of his life, and that he, the said John Ludford, " after he attained his age of 21 years, to wit, on the 1st Febru-" ary 1779, at, &c. did duly execute and confirm the said lease " for the remainder of the said term then to come and unexpired "in the said demised premises to the said John Barber. "That after the making of the said indenture, and after the " death of the said John Bracebridge Ludford, to wit, on the "3d December 1780, and on divers other days and times "between that day and the 1st of June 1784, the defen-"dant did get and sell upon the said demised premises a "large quantity, to wit, 20,000 loads of coals, and also did " get and convert into coak, and so sell, another large quan-"tity, to wit, other 20,000 loads of coals upon the said " premises, and by reason thereof the said defendant then "and there became liable to pay to the plaintiff the sum of " 3000l. being at and after the rate of 1s. 6d. for every such "load of coals, &c.; yet that the defendant hath not " paid, &c. " And further, that since the death of the said John Brace-

" bridge Ludford, to wit, in the 12th year of the said term. " commencing from the 29th September 1780, and ending on " the 29th September 1781, the said defendant did not work " the said colliery in such manner as to get, sell, or pay rent " for 1000 loads of coals, or any part thereof, in that year; "by reason whereof the defendant became liable to pay to " the plaintiff the further sum of 751. &c. yet the defendant

" hath not paid, &c."

It then stated a similar breach for non-payment of 75%. &c.

" from 29th September 1781, to 29th September 1782. A similar breach for non-payment of 751. &c. from 29th

September 1782, to 29th September 1783.

Then it stated that " after the making of the said inden-" ture, to wit, on the 29th September 1780, the sale of the " dry seven foot coal in the said Thomas Atkins's grounds in " the said indenture mentioned, did cease to produce 100/. a "year; by reason whereof, &c. the certain rent of 751. per " annum became due and payable, &c. and that 2251. of the " said certain rent of 75l. per annum for three years, ending "on the 25th March 1784, became due and payable to the "said plaintiff for the said demised premises; yet that he " hath not paid, &c."

PLEAS,

PLEAS, no rent in arrear, to each of the five breaches. 6th, And for further plea, &c. " As to all the said suppo-"sed breaches of covenant the defendant says that the said Luproup "plaintiff ought not to have or maintain his aforesaid "action against him, because he saith that the said John Lud-"ford did not at the time of making the lease in the declaration "mentioned by the said J. B. Ludford, nor at any time during "his life-time, nor for a long time, to wit, the space of two "years after his death, execute the said lease; and that upon "the death of the said J. B. Ludford the said lease and demise "did, before any of the rent or money in the said declaration "mentioned became due or payable, to wit, on the said 1st day " of March in the said year 1776, when the said J. B. Ludford " so died, cease and determine, &c."

7th, " As to all the money in and by the said declaration "alledged to be due before and on the second of December "in the 21st year of his present Majesty, the defendant pleads "generally that he became a bankrupt on 2d December, and "that the cause of action in respect of such money accrued "before, &c."

8th, " As to so much of the rent and money mentioned in "the several breaches of covenant in the said declaration as-"signed, and which by the said declaration are supposed to "have become due to the said plaintiff, he be said defendant "says that the said plaintiff ought not to have his aforesaid "action thereof maintained against him, because he says "that he the said defendant, after the making of the said "indenture in the said declaration mentioned, and before "the exhibiting of the bill, &c. to wit, on the 1st day of "October 1779, and from thence until the day of suing out "the commission of bankrupt hereafter mentioned, was a "trader within the intent and meaning of the several sta-"tutes made and then in force against bankrupts, to wit, a "miner, dealer in coals, &c. and during all that time there "sought his livelihood and way of living by buying and "selling: and the said defendant so being such trader, &c. "afterwards, and before any of the said rent or money be-"came due and payable, to wit, on the 2d of December in "the 21st year aforesaid, became and was indebted to one "Braham Bracebridge in 1001. for money lent, &c. and be-"ing so indebted, &c. became a bankrupt within the intent "and meaning of the statutes against bankrupts. That the "said Abraham Bracebridge, on the 2d of December in the "21st year aforesaid, petitioned the Lord Chancellor for a "commission of bankrupt against the defendant; that on "the said petition being exhibited, afterwards and before

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"any of the sums of money in the breaches assigned be-" came due, and before any breach of the covenant afore-LUBFORD " said, to wit, on the 2d of December in the 21st year a-" foresaid, a commission issued, &c. That on the 6th day " of December in the 21st year aforesaid, the commissioners " named in the said commission of bankrupt duly adjudged "and declared the defendant to have been and become on " the day of issuing the said commission, and then to be, a "bankrupt, &c. And afterwards and before any of the " sums of money in the said breaches assigned, or any part "thereof, became due, to wit, on the 6th of December in "the year 1780, the said commissioners bargained, sold, "disposed, and set over, (among other things) the said in-"denture of lease in the said declaration mentioned, and all "the estate and interest of the said defendant of, in, and to, "the same, and of, in, and to, the premises thereby demi-" sed unto one David Cadell and his assigns, in trust for the " creditors of the said defendant; by virtue of which said " assignment all the estate and interest of the said defend-"ant, &c. became and was vested in the said David Ca-" dell, and he then and there became possessed of the said "demised premises, and continued so thereof possessed till "the 14th day of March 1781: And that afterwards, to " wit, on the said 14th day of. March 1781, the said defend-" ant then remaining and continuing a bankrupt as aforesaid, "the said David Cadell and the said commissioners bargain-" ed, disposed, assigned, and set over, (among other things,) "the said indenture of lease, and all the estate and interest " of the said defendant, of, in, and to, the same, to the " said Abraham Bracebridge and William Greaves, (they, the " said A. Brucebridge and W. Greaves, being duly chosen "assignees of the debts, credits, &c. of the said defend-"ant,) for the residue of the said term; by virtue of which " said assignment all the estate, interest, &c. of the said "defendant of and in the said indenture of lease, and of, "in, and to, the premises therein demised, became and " was vested in the said A Bracebridge and W. Greaves, and " the same from thence hitherto hath been and still is vested " in them the said A Bracebridge and W. Greaves, the said " commission still remaining in full force, &c. And they " then and there became and were, and from thence hitherto " have been, possessed of and in the said demised premi-" ses, &c. (a)."

Replication

<sup>(</sup>a) It was not mentioned in the pleadings that the defendant had obtained his certificate.

Replication to the 1st, 2d, 3d, 4th, 5th, and 7th pleas; and issues thereon. General demurrer to the 6th and 8th pleas; and joinder in demurrer.

LUDFORD
against
BARBER.

This was argued last Michaelmas Term, by Wood in support of the demurrer, and Morgan against it; and now on this day by Balguy for the demurrer: Wilson was to have argued on the other side, but was stopped by the Court.

For the plaintiff it was contended, as to the 6th plea, that the defendant is estopped by his indenture from pleading such a plea; because it is averring a fact contrary to the indenture. It might have been different perhaps if it had been by deed poll. A party is estopped by the date of his indenture at much as he is with respect to the estate of the lessor. This hase, on the face of it, imports to be a lease from a tenant for life, and him in reversion; and the defendant, having executed it, cannot now be permitted to contradict the indenture, and to allege that the lease was not executed as it imports to be. 1 Leon. 156. 1 Rol. Abr. 172. 3 Leon. 203.

But supposing he is not estopped, there is no fact introduced into this plea to shew the date of the lease material. The material fact here is, whether there be any rent in arrear or not. If it had been averred that the rent became due before the execution by Ludford the son, that might have been such a material fact as to have induced an enquiry into the date of the lease. This lease before the execution and confirmation by the plaintiff was only voidable, not absolutely wid: from the moment the son executed the lease, it become a valid one; and the breaches are not assigned till a time subsequent to the execution of the lease by the reversioner. So that, whether the lessee be estopped or not by the date of the deed, it makes no difference; for there was a valid and subsisting lease between the parties at the time the rent accrued; and the 6th plea is no bar to the plaintiff's demand.

As to the 8th plea, the circumstance disclosed by this plea neither extinguish, nor transfer, this debt. The defendant has not pleaded his certificate, and of course no advantage which he might derive from that can be taken here. This plea is founded on this reason, that the lessee is become a bankrupt, and by law his estate is transferred to the assignees. But there is a distinction between an action of debt and an action of covenant. In an action of debt (a), as in Wadham and Marlowe, (which was brought on an implied covenant

in

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in law, the reddendum,) where the bankrupt pleaded his bankruptcy, the assignment by the commissioners to the assignees, and his certificate, the court held that an action of debt on the reddendum against a lessee whose estate had been transferred by law to an assignee, could not be maintained. And it is clear in Mursh and Brace (a) that, after the lessor had assented to an assignment, no action of debt could be brought. The case of Wadham and Marlowe went on an acceptance in haw, because every man's assent is virtually included in an act of parliament: but that was decided solely on the nature of an action of debt, which arises out of the perception of the rents and profits. For on an express covenant to pay rent, covenant lies against the lessee for rent arrear after his assignment (b). And in Barnard versus Godscull (c) it was determined that an action would lie against the lessee on an express covenant to repair, after an assignment by him, and acceptance by the lessor. In the case of express covenants, the lessor has his election which of the two he will sue, either the lessee or the assignee; for the lessee expressly covenants for himself and his assigns.

The distinction between actions of debt and covenant is

well taken, and recognized in 1 Saund. 237.

As therefore it is clear that a lessee cannot by his own act discharge himself from his express covenant, the question here is, whether the present defendant can discharge himself from his express covenant by an act of bankruptcy. depends partly on his own act and partly on the operation of law; his trading and becoming a bankrupt were his own acts; but the transferring of the estate was the act of law. Now his becoming a bankrupt almost amounts to a crime. and therefore should not operate so as to discharge him from his covenant. He may perhaps be discharged by eviction, where another person has a better right; because that arises from the lessor's defect of title. But the cases of Mayor v. Steward (d), and Cotterel v. Hooke (e) (which were on collateral covenants,) shew, that though the means of fulfilling the contract were taken away from the party, he was still Liable on his express covenant.

However, if there be any doubt on this point, the case of Hornby v. Houlditch is decisive. That was an action of coverant in Mich. 10 Geo. 2. B. R. for rent due on an indenture of lease made to R. Houlditch, the defendant's testator, for years. The defendant pleaded the statute 7 G. 1. c. 28. entitled "An act for raising money upon the estates of the general weekly and the state of the state of the general weekly and the general

(a) Cro. Jac. 334. (b) 1 Sid. 447. (c) Cro. Jac. 309. (d) 4 Burr. 3439. (e) Doug. 97.

" governor, directors, &c. of the South Sea Company, &c." And that her said testator was one of the directors, and therein named, and was thereby acquitted and discharged of Luprorp and from the payment of all rent due on the said lease; to which the plaintiff demurred. On the first argument, Lord Hardwicke (a) gave a very strong opinion in favour of the plaintiff. The three other judges agreed with him, but as it was a case of great consequence, it was adjourned. Afterwards it was argued a second time in Mich. 11 Geo. 2, when Lord Ch. J. Lee presided here; and the court (b) being una-VOL L

against BARBER.

(a) Ld. Hardwicke, Gh. J. Here are two questions. First, whether this can be considered as a debt included within the act of parliament to be claimed according to the provisions of that statute? Secondly, whether it be such a debt as that the privity of the estate and contract was determined and discharged?

As to the first. I cannot conceive how rent, accrued since the statute, can be such a debt or claim as could be satisfied under the statute. Ld. Mucclesfield was of opinion in the case cited that it did not discharge the person: but the teason of dissolving the injunction was, because, if by the statute the person were discharged, he might plead the statute in bar at law. What were the creditors enabled to claim by the statute, and what claims are the trustees to allow?

Debts at that time become due and subsisting; or money due upon bonds at a fature day; for that is a debitum in presenti, volvendam in futuro: but here was no debt subsisting at the time. The directors are in the same situation in which bankrupts were before 6 G. 1. c. 22. and 5 G. 2. c. 30; for before these statutes their persons remained liable. So before 7 G. 1. c 31, creditors whose debts were not become payable before the party became bankrupt, were not entitled to a rateable part of the bankrupt's estate; and consequently the bankrupt was

never discharged as to them, but afterwards remained liable.

As to the second point, It is a rule that private acts of parliament introduce ed only for the settlement of particular estates ought to be considered only as common conveyances, and directed by the same rules of law; and therefore cannot be taken to extend as a discharge of any person's right not mentioned in the age, 1 Feat. 176. But every person is considered as assenting to a public act, and therefore the plaintiff in this case must be considered as assenting to the signment of the term to the trustees according to the provisions of the statute. The act of parliament vests all the estates, &c. of the governors and directors of the South Sea Company in certain trustees. But what is there here to discharge the privity of contract or estate between the lessor and lessee? Or what in there to discharge an express covenant? But it is said that by an express proso of the statute 5000/, is left to Houlditch for the subsistence of himself and Samily; which is utterly impossible, if he still remain liable to answer all debts and demands; and therefore to entitle him to this benefit it must be intended, by a necessary implication, that the statute has discharged all debts and demands a the same might be said in case of a bankrupt, before 7 G. 1.; for by the 4 G. 2. 24. a bankrupt is allowed 5 per cent. out of his estate not exceeding 200%. and ne notwithstanding that he remained liable to answer debts that were not then become due. So in the present case, here is an allowance for necessary subsistcace; but that does not shew the intentions of the legislature to discharge from the not then subsisting. Suppose the lessor had joined in an assignment of the ners, would that have discharged the express covenant ! It would amount to no more than a confirmation; so that in the present case, although the plaintiff is considered as assenting to the assignment, yet it is impossible to put such a constructive sense upon the act of parliament, as to extend it to discharge an express amenent. MSS. Clive J. (b) Andr. 40.

1786. nimously of opinion that this act could not be considered as a discharge or acquittal of the original lessee, gave judgment Lucrors for the plaintiff.

against
BARBER.

This case in Andrews was not taken notice of in Wadham and Marlow; because the latter was an action of debt, and the former of covenant. An action of debt is founded not simply on the demise, but on the subsequent enjoyment.

If the court should decide that an act of bankruptcy will discharge the bankrupt from his express covenant, it will open a door to fraud, and the most mischievous consequences; for a man may fraudulently commit an act of bankruptcy, and get assignees appointed, who may assign the lease to a beggar, and by those means deprive the lessor of all remedy on the lease; since it is clear that the assignee is only liable during the time he has the estate.

For the defendant it was insisted that, as the plaintiff had demurred to the defendant's plea, he had a right to take every advantage of the declaration; which was open to two excep-

tions

1st, The declaration states that "before, and at the time of making the indenture, one John Bracebridge Ludford and the plaintiff were respectively seised of the premises there- in described, to wit, the said John Bracebridge Ludford in this demesne as of freehold for the term of his life, and the plaintiff of the reversion thereof expectant on the determination, &c.; and being so respectively seised, demised,"

&c. This is bad in point of law (a) 6 Co. 14. b.

2dly, The covenant is that the defendant shall pay for every load of coals 1s. 6d. to the landlord; and that if he do not in any one year dig 1000 loads of coals, he shall pay 75d. per annum certain. Here the first breach is for digging 1000 loads per annum, and not paying 1s. 6d. per load. And the four subsequent breaches go for 75l. per annum, for not digging 1000 loads in each year. Therefore the indenture should have been set out a second time, before the four last breaches were assigned, that it might not appear to be inconsistent.

In support of the sixth plea. It appears on the record that John Bracebridge Ludford was tenant for life, and that the plaintiff was the reversioner. This is admitted by the demurrer. Then the declaration states that John Bracebridge Ludford died on the 1st March 1776, and that the plaintiff

(a) The case in Coke is that of a joint lease by A, and B,—A, being tenant for life, and B, being seised of the remainder in fee.

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BARBER.

after he attained his age of 21 years, to wit, on the 1st February 1779, executed the lease; consequently that the lease was not executed by the plaintiff till two years after the death Lung are of the tenant for life: so that it appears on the face of the declaration that the lease was not executed as it imports to be. Originally this was a lease by the tenant for life: but this was such a lease as he had no right to grant; for he could only grant a lease for his own life; and the moment he

died, the lease was at an end. With respect to the 8th plea; The bankrupt laws were passed for the benefit of creditors in general. They were intended for the punishment of dishonest bankrupts, and for the advantage of honest ones. The case (a) of one of the directors of the South Sea Company was a case of great fraud; and the act of the 7 G. 1. was passed as a punishment

on them. The case of Mayor and Steward was determined against the bankrupt, because it was on a collateral covenant. Here both the privity of estate and of contract is transferred by law to the assignees.

Lord MANSFIELD, Ch. J. There ought to have been a re-execution by the lessee after the father's death (b). This lease is so far void, that the plaintiff need not have given no-

tice in ejectment against the defendant.

BULLER, The cases in Saunders and Cro. Jac. are good law, but they are not applicable here. The question is on the 8th plea, what is the effect of the assignment under the commission of bankrupt as to the contract itself? And this was one of the points on which Wadham and Murlowe

But on the other ground it is clear; for the lease is absolately void. The court cannot go on the doctrine of estoppel in this case, because it is admitted by the plaintiff's own shewing on these pleadings that the plaintiff did not execute till two years after the death of the tenant for life. Here A. was tenant for life, and B. the reversioner; A. only executed a lease, in which they were both named; therefore on A.'s death, it was totally void. Then it must be contended for the plaintiff, that, if B. executed it any time afterwards, it should bind the lessee. But the reversioner can never set up such lease against the lessee, for it is not his covenant.

Judgment for the defendant (c).

<sup>(</sup>a) Andr. 40. (b) Vid. Cp. Lit. 230. b. n. 1, 231. a. Cowp. 201. 482. Quagl. 53. (c) Vid. Auriol v. Mille in error, poet. 4 vol. 94.

1786. Saturday, Jan. 28th.

The KING against The Inhabitants of HODNETT.

within the the marriage act, 33. which requires the consent of the father, mother, to the marriage of persons under age, who ried by banns, 1

Bastards are PY an order of two justices, the pauper Mury Miles, and Anne her infant daughter, were removed from the parish meaning of of Stanton upon Hine Heath in the county of Salop to the parish of Hodnett in the said county: and on an appeal to the 26 Geo. 2. c. sessions the order was confirmed; subject to the opinion of the court of King's Bench on the following case.

" Mary Miles, an illegitimate child, was born in the parish " of Hodnett. On the 10th of January 1782, she, being then guardian, or " under 21 years of age, was married to Richard Teeco. who " was born in the parish of Stanton upon Hine Heath, and who " was also then under 21 years of age, and illegitimate, as "appeared by the several registers of their haptism, and the " evidence of the mother of the said Mary Miles. are not mar- 46 tative father of Richard Teece died in 1779; and his mo-"ther died in 1764. The putative father of Mary Miles "died several years previous to her marriage; and her mo-"ther in the year 1772 married Richard Lowe, who, as well " as his wife, is still living. Neither Richard Teece the hus-"band, nor Mary Miles the wife, had ever any guardian or " guardians appointed for either of them, nor was any consent " given to their marriage by any person acting h that charac-"ter, or by the parent or parents on either side. No witnesses " appeared on procuring the licence from the surrogate, de-" posing to the consent of the parents or guardians on either " side having been obtained, or that the parties to be married " were of the age of consent; but the person, who applied " for a licence, being the said Richard Teece, swore that the " parties were both of age."

The question for the opinion of the Court turns on the va-

lidity of this marriage.

Leyvester, in support of the order, maintained that the marriage act 26 Geo. 2. c. 33. extended to illegitimate children; for they were within the mischief intended to be remedied by the act, which was passed for the purpose of preventing clandestine marriages: and if so, the marriage was void to all intents and purposes whatsoever by the eleventh section.

If one part of this act extended to illegitimate children. the whole did. By the 16th section, persons convicted of making

making a false entry of a marriage in the register book, or of forging such entry, were guilty of felony; but it could not be contended that it would not be felony to make a false The KING entry in the register of a marriage, where one of the parties against The Inhabi-was illegitimate. That this act, being a general one, extended to all persons, unless those who were particularly ex- Housett. cepted; as in the 17th section, which excepted the Royal Family; and the 18th, where there was a further exception, as to Jews, Quakers, and marriages out of the kingdom. So that it was clear that wherever the Legislature intended to make exceptions to the general law, they had expressly done it. There was not therefore any pretence for saying that illegitimate children were not included in the act. The only reason which could be suggested for such a supposition was founded on the old maxim, that a bastard is nullius filius: but in point of law that maxim was not universally true, for if it were, a bastard might marry his own mother, which could never be allowed. 1 Ld. Ray. 68. Haines v. feffell. The only way in which it was true was, that a bastard had m inheritable blood; Co. Litt. 123; where it was said that a bastard is quasi nullius filius, because he cannot inherit. 1 Blac. Com. 459. confirmed the same position. A father has a right to take his illegitimate child out of the parish. 1 Ventr. 48. Burwell's case. 1 Ventr. 210. Sherman's case. 1 Burn, 199. 3 Burn, 365. But at all events these parties might have applied to the court of Chancery to have had guardians appointed for the purpose of consenting to the marriage, as was the usual practice in that court.

He then cited the case of The King against the Inhabitants of Edmonton in this court (a), where the principal question was, whether a bastard child who married with the consent of the putative father were legally married? It was contended there, against the marriage, that the putative father was not such an one as was meant by the act of parliament; but the court were of a different opinion. Willes, J. in that case said, that the act of the 26 Geo. 2. on which the question turned, ought to have a liberal construction, and that the word lawful (as annexed to children) was not in the act. Ashburst, J. thought the words of the act were complied with. And Buller, J. relied chiefly on the case of The King and Comfortin, 2 Stra. 1162, where it was held that an illegitimate

child was within the statute 4 & 5 Ph. & M. c. 8.

Phumer

(4) East. 24 G. 3.

1786.

Plumer on the same side was stopped by the Court, who desired to hear the argument è contra.

The KING tants of

Bearcroft and Syer, in support of the rule, insisted, that The Inhabibefore the court; for, in the case of The King against Ed-HODNETT. monton, the marriage was had with the consent of the putative father. And Mr. Justice Butler expressly said, "that it " was unnecessary to decide whether a putative father were " within the act or not; for taking it either way, the marri-" age was good: if the consent of the putative father were " necessary, it had been obtained; if it were not necess ry, "then the marriage was good without." That the maxim of a bastard's being nullius filius extended to this, that in such cases the relation of father and child did not exist in law. That there was a further reason for supposing that the consent of a putative father was not within the provisions of the act of the 26 Geo. 2. as it makes no express mention of it; for the 18 Eliz. c. 3. \ 2. and the 13 & 14 Car. 2. c. 12. § 19. have the words "reputed father" and "putative father;" which shewed that wherever the Legislature meant to speak of illegitimate fathers, they had made express mention of them.

That this act was in restraint of the natural liberty of the subject, and of the common law, which existed before the passing of it. It was a sacred principle not to extend by construction any law which restrained natural liberty. licy of this law had always been much doubted, for it onerated in restraint of marriage, and so far in restraint of population. That the parents spoken of in the act could only allude to legitimate ones; for the 11th section said that the marriages of minors (unless by banns) should be had with the consent of the father, or if dead, of the guardian lawfully appointed, or in case there he no such guardian, then of the mother, or lastly of a guardian appointed by the court of Chancery. But the guardian, which the act interposed between the father and the mother, did not exist in the case of illegitimate children; for no one but a legitimate father could appoint such a guardian. By the 3d section of the act, parents might dissent to the publication of banns, and prevent the marriage. Now the parents spoken of in that section were of the same kind as those mentioned in the other parts of the the act: but it could not be contended that a putative father could come into a church, and prohibit the publication of such banns; for that would be to subject himself to eccleaiastical censures.

Besides,

Besides, part of this act created a new felony, and therefore it ought not to be extended by construction; and yet if the court should introduce a number of new objects on whom The Kind the statute was to operate, it would extend the felony conagainst
The Inhabitrary to the general rule in such cases. As to the case cited tants of from Lord Raymond, it did not appear to have been deter- Hodnert. mined; and the case of The King and Cornforth was not applicable here. That was expressly determined on the 3d section of the act, in order to avoid this very question: for though the two first sections of the statute 4th and 5th Ph. & M. c. 8. did not extend to illegitimate parents, the 3d section seemed to have been framed expressly for the purpose of avoiding any distinction between legitimate and illegitimate parents; for it has these words, "out of the posses-"sion, and against the will, of the father or mother of such " child, or out of, or from, the possession, and against the will " of such person or persons as then shall happen to have, by any " knoful ways or means, the order, keeping, education, or go-"vernance, of any such maiden or woman child."

That it had been determined (a) that a putative father was not within the meaning of the 43 Eliz. c. 2. s. 7. which obliges parents and children, &c. to relieve each other.

They then cited Dyer 345, pl. 4. 6 Co. 77. a. and Prec. in Chan. 475.

Lord MANSFIELD, Ch. J. Before this act of parliament passed, by the laws then in being, if a man and woman made a contract in private per verba de presenti, and kept it a semet, and afterwards there was a public marriage solemnized by either of them, and issue born of that marriage, nevertheless the private contract took place of the subsequent marriage; because the canon law compelled a strict observance of these contracts, and decreed them to be solemnized in the face of the church. Therefore clandestine marriages were so far to be sure practicable that the courts would not avoid the contract; but still they were contrary to law.

The law of England executed by the ecclesiastical courts prohibited it, and made it unlawful to marry any person in private; so that no clergyman of reputation dared to marry my person without either licence or banns. If they married with licence, there was an oath that the parties were of age; or if under age, that they had the consent of parents or guardians. If by banns, it was no objection to the marriage that

the parties were under age.

A۱۱

All other marriages were illegal; but not being vacated,

the practice still continued. Therefore this act was passed The King in order to prevent these illegal practices, which were become The Inhabiother prisons for the purpose of celebrating clandestine mar-Hodrett riages. The court of Chancery, on the ground of it's illegality, made it a contempt of the court to marry one of its wards in this manner. They committed the offenders to prison; but that mode of punishment was found ridiculous and ineffectual. Then this act was introduced to remedy the mischief, and in fact only made that less practicable, which was before illegal. So that I cannot go into arguments on the impolicy of the law; and if I could, it would be sufficient to say that several attempts have been made to repeal this law in parliament, where great characters have taken the lead. all of which have proved ineffectual.

Then the question is, What is the law? The meaning of the act is, that where there is the consent of a father or guardian lawfully appointed, or of a mother, or guardian appointed by the court of Chancery, the marriage shall be valid: but here there was no consent by any one; consequently, in my opinion, it is void by the marriage act. There is no reason to except illegitimate children, for they are within the

mischiefs intended to be remedied by the act.

Ashhurst, J. There is no inconvenience in putting this construction upon the act; for persons in this situation may

marry by banns.

BULLER, J. I agree with Mr. Bearcroft that this is the first time that this question has come directly before the court: for in The King and Edmonton it was not necessary to decide it. And though my brothers Willes and Ashhurst gave a direct opinion on the act, I went on the other ground. Now the objection to the order of sessions, and in support of this marriage, is, that if the court should determine that a bastard is within the act of parliament, we shall by construction multiply the number of felonies; but that is not the case. There are but two clauses which create felonies; the first is the 8th section, by which, " If any person shall solemnize ma-" trimony in any other place than a church or public chapel, "where banns have been usually published, unless by spe-"cial licence from the Archbishop of Canterbury; or shall " solemnize matrimony without publication of banns, un-" less licence of marriage be first had and obtained from " some person or persons having authority to grant the same:

" every person knowingly and wilfully so offending, and be- 1786. " ing lawfully convicted thereof, shall be adjudged to be guil-"ty of felony." Now it cannot be material on an indictment The KING for such an offence what the condition of the parties was, nor the Inhabitant you enquire into it: it is the fact of celebrating the martants of tants of the fact of constitutes the felony. Hodge under such circumstances which constitutes the felony. Again, by the 16th section, "If any person shall knowingly "and wilfully insert, or cause to be inserted, in the register "book of such parish, &c. any false entry of any matter or "thing relating to any marriage, or falsely make, alter, forge, "or counterfeit, or cause or procure to be falsely made, &c. "any such entry in such register, &c. or falsely make or "procure to be made, &c. any such licence of marriage, "Ec. or wilfully destroy any such register of marriage, Ec. "the same shall be guilty of felony." It would be no answer to a prosecution for such a crime to say that the parties were bastards, because the fact of forging an entry or licence, or of destroying a register, is still the same.

It is not true that the Court, in the exposition of penal statutes, are to narrow the construction. We are to look to the words in the first instance, and, where they are plain, we are to decide on them. If they be doubtful, we are then to have recourse to the subject matter; but at all events it is only a secondary rule. Now these words are very general. act speaks of all persons, except under particular circumstances. Then does this come within any of these exceptions? If it do not, it falls under the general regulations established by the act. Besides, the rule that a bastard is nullius flius applies only to the case of inheritances; it was so con-

sidered by Lord Cake.

Both orders confirmed.

# The KING against The Inhabitants of GRESHAM.

Siturday Jan. 28th.

PHIS was a rule to shew cause why an order of the Where the court of Quarter Sessions of the city and county of master in-Norwich confirming an order of two justices, by which the sixed on pauper was removed from Beeston Regis to Gresham in Nor-turning afolk, should not be quashed.

The case stated, "That William Thompson the younger threw down "was, prior to Michaelmas 1780, a settled inhabitant in the his wages, " parish of Gresham in Norfolk, when at the Holt petty Ses. which the other took

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way his sersions up and then

and after the expiration of six days returned at the master's request, and served the remainder of the year, the absence was not purged by the subsequent return. A contract, once disolved, cannot be set up by a subsequent agreement.

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" sions next before that Michaelmas he let himself for a year " at the wages of 3L to Mr. Creemer of Beeston Regis in the The King " said county. That he duly entered upon his said service " with the said Mr. Creemer, and continued therein for a-The Inhabi- "bout a quarter of a year; and upon some dispute between GRESHAM. " him and his master, his master insisted upon turning him " away, and threw down 15 shillings, which the pauper took up " and went away to his father's house in Norwich, where " he continued for six days; during which time he looked " upon himself as a free man. That the pauper then return-" ed at the request of his master, and continued in the service " to the end of the year, when his master paid him 45 shil-"lings, being the remainder of his wages agreed for at the " Sessions."

> Partridge against the rule contended that, in order to gain a settlement by service, there must be a continuation of the service for a year, not indeed under the eye, but under the control, of the master the whole time. Here there was an entire dissolution of the contract for a time, by the servant's taking up the money which his master had thrown down, and went away with his consent : if so, no subsequent circumstances could revive the former contract. It is stated too. that the pauper returned at the request of the master, which proved that an option was left to the person so requested and although the servant did in fact return, yet that could not cure the chasm made by the interruption of the service. The cases in which time has been dispensed with, were either where there had been an express consent on the part of the master that the servant should live with some other person for a time, or an implied one, where the servant went without the leave of the master and returned again: but in this case there was a mutual consent to part.

In the case of The King and Caverswall (a) it was determined, that no settlement was gained, because there was a chasm for a fortnight. The cases of The King and Ross (b) and The King and East Kennet (c) decided also, that there was no settlement because there was a dissolution of the contract.

Bearcroft and Preston, contra, relied on the distinction between the cases cited and the present. In The King and Caverswall the servant was discharged with his own consent. Here the master insisted upon turning him away. In that case too the servant was hired again for another year, which imported on the face of it to be a new contract. sent there was no new contract, he continued serving for the

<sup>(</sup>a) Burr. Set. Cases 461. (b) Burr. Set. Cases 688. (c) Mich. 26 G. 3.

remainder of the year; there was no deduction in his wages, and no additional service in another, year. The absence was purged by the subsequent consent of the master. In The THE KING King and Ross there was an acknowledged dissolution by the against act of the parties; for they attempted to cure it by substituting a month in the next year. Here there was a continuation GRESHAN. of the service under the original contract. The King and East Kennet also differed from this; there the master and servant parted by consent. In all those cases both the contracting parties consented to dissolve the contract, which distinguished them from the present case, where the master only signified such his determination: for as to the servant thinking himself at liberty, that has frequently been determined to have no weight (a). It was decided in the case of The King and Islip (b) that the master's turning away the servant before the expiration of the year, without the servant's consent, did not prevent his gaining a settlement.

Lord MANSITELD, Ch. J. The absence of a servant from his master's service is an equivocal act, and therefore may be explained by other circumstances; but if it appear that the contract has been once dissolved, it cannot be set up by a new agreement. In this case the contract was absolutely dissolved; the master insisted upon turning away the servant, and paid him down all his wages that were due; the consent on the other side was by taking up the money. Then how did he come back again? It was upon the request of the master. There is nothing by which the absence can be explained. The meaning of "purging an absence" is where the

act itself is doubtful.

Rule discharged (c).

(a' Burr, S. C. 152, Cald 81. (b) 1 Str. 423. (c) Vid. post. 2 vol. 624. R. v. St. Philip in Birmingham Tr. 28 Geo. 3. R. v. Grantham, post. 3 vol. 754; & R. v. Claybydon, post. 4 vol. 100.

## The KING against ROBERT CHAMBERLAYNE.

*Saturday,* Jan. 28th.

SIR Thomas Davenport shewed cause against a rule, which Under the had been obtained by Bearcroft, that the defendant's re-3d section of cognizance in this case might be discharged.

The facts appeared to be, that, the defendant having been gulning the indicted at the general sessions of the peace for the city of removal of London for an assault, the indictment was removed into this indictments

from the sessions by certiorari, the

representatives of the prosecutor are entitled to the costs taxed during his life, though no personal demand were ever made by him. For though it take away the remedy by attachment, it does not affect the debt. When costs are taxed, they become a debt.

against

1786. court by Certiorari; and on the trial the defendant was found guilty, and afterwards sentenced to pay 6s. 8d.; which he The Kree paid. The prosecutor is since dead, and no person hath administered to his estate and effects. And no demand having been made by the prosecutor in his life-time for the costs, this motion was made upon the supposition that they never could be demanded now; the words of the statute 5 W. & M. c. 11, § 3, being, "That the prosecutor for the reco-"very of such costs shall, within ten days after demand " made of the defendant, and refusal of payment on oath, "have an attachment granted against the said defendant." On this statute the prosecutor may move for an attachment for non-payment of costs after a demand by him made, but that could not be done in this case for want of a personal demand.

It was now contended against the rule, that the recognizance should not be discharged, because either the attorney has a lien on it for his fees; or if the Court should determine that he is not entitled to it, the executors or administrators of the prosecutor ought to have the advantage of it; for the costs were taxed in the life-time of the prosecutor.

The Court considered these costs as a debt actually vested. Rule discharged.

On a subsequent day (administration having been granted of the prosecutor's effects) Sir Thomas Davenport moved that the defendant's recognizance might be estreated, to entitle the personal representatives of the prosecutor to the costs.

Bearcroft contended that, no demand having been made by the prosecutor in his life, his personal representatives were not entitled to the costs of this prosecution under the statute 5 W. & M. c. 11. and therefore it would be nugatory to es-

treat the present recognizance.

Buller, J. When the costs are taxed, they become a debt: and the demand, which must be made under this act of parliament, is only as to the remedy. The remedy given is by attachment: and to bring a party into contempt, he must come within the letter of the law : therefore there must have been a demand of ten days on the defendant before an attachment could have gone against him. But here the costs were taxed in the life-time of the prosecutor; they became a debt vested, and will go to his personal representatives.

Per Curiam,

Rule absolute;

1786.

DOE on the Demise of PHILLIPS and Others against Tuesday, PHILLIPS and Others.

You. 31st.

THIS ejectment was tried at the last Bodmin Assizes be-fore Mr. J. Buller, when a verdict was found for the being seised plaintiff, subject to the opinion of this Court on the follow-of one undimg case. The will of Henson consists of four tenements: and to of three tenements " Jonathan Phillips being seised in fee in possession of one in A. and " undivided moiety of three of the said tenements, being the also of the " premises in question, known by the name of Henson; and reversion in also being seised of the reversion in fee expectant on the ant on the " death of Mary Trefry of the other moiety thereof; and death of J. " also seised of divers lands situate in the borough of Bod-S. of the "min, leased on lives, and of other lands in possession in other moiety thereof, " Bodmin, and of several other lands in the county of Corn- and also " wall; on the 4th of November 1770, by his will of said date, seised of " devised (amongst other things) as follows: Ale that my part, lands leased purpart, and portion, of and in the tenement called and known B, and of "by the name of Henson, within the parish of St. Minver other lands aforesaid, where I lately dwelt, and also all my other lands in in possession " fee simple, situate, lying, and being, in Bodmin, in the said in B. a dof " county of Cornwall, and the reversion and reversions, remain-other lands " der and remainders, rents, issues, and profits thereof, I give, in the coun-" devise, and bequeath, unto my kinsman Nicholus Phillips of ty of C. by " the borough of Bodmin aforesaid, his heirs and assigns for N. P. of "ever; To have and to hold the same unto him, the said "all that "Nicholas Phillips, his heirs and assigns for ever, to the only "his part, proper use and behoof of the said Nicholas Phillips, his "purpart, "and perti-"heirs and assigns for evermore. And as to all other my "on, of and " fee-simple lands within the county of Cornwall aforesaid, " in the te-" ree-simple lands within the country of dornada and allower, " nement or elsewhere, I give, devise, and bequeath, to William " nement called d,

" the same, and the reversion and reversions, remainder and " situate in "remainders, rents, issues, and profits thereof, unto them "B and the " the said William Phillips, Nicholas Phillips, and John Phil. " reversion " lips, " mainder

" thereof,"

The whole of the testator's estate in A. whether in possession or reversion, passed to N. P.

"Phillips, Nicholas Phillips, and John Phillips, the three and also sons of Nicholas Phillips my kinsman, of the parish of Dar- of all his " Engton in the county of Devon, to be equally divided be-"other "tween them, share and share alike; To have and to hold "lands in "fee-simple Don dem.
Puritips
against
Phillips.

" lips, their heirs and assigns for ever, to the only proper use, benefit, and advantage of them the said William Phillips, " Nicholas Phillips, and John Phillips, their heirs and assigns for evermore.

"The testator died on the 13th day of the same November, without revoking his said will.

" The said Mary Trefry sied on the 20th July 1775.

"The lessors of the plaintiff are the daughters and co"heiresses of Nicholas Phillips of the borough of Bodmin in
"the said will named, who survived the devisor, and died
"in the year 1774; and are in possession of one undivided
"moiety of the premises in question.

"The question for the opinion of the Court is,

"Whether the lessors of the plaintiff are entitled to recover the other moiety of the premises in question under the said will of the said Jonathan Phillips?"

Gibbs for the lessors of the plaintiff contended,

1st, that the words "All that my part, purpart, and por"tion, of and in the tenement known by the name of Hen.
"son" were sufficient to pass the moiety in reversion, as well
as that in possession. That if the devisor had been possessed
of only one moiety of the tenement in question, whether in
possession or reversion, either would have passed by this devise. That it therefore was incumbent on the defendant to
shew to which of the moieties these words were more immediately applicable; as they did not relate to one more than to
the other. That these words could not be construed so as to
negative the devisor's intention of giving the whole; for they
were not applied to the interest which he had in the tenement
of Henson, but to the tenement itself.

But 2dhy, if the moiety in reversion did not pass by these words, it did by a subsequent part of the will, where he devises "All his other lands in fee-simple in Bodmin in the "county of Cornwall, and the reversion and reversions, re-"mainder and remainders, rents, issues, and profits, thereof, unto the same Nicholas Phillips." The reversion here applies to the tenement in Henson, as well as his other lands in Bodmin. But if there be any doubt on this, it is clear from the residuary devise that the testator intended to devise the moiety in reversion, as well as that in possession, to Nicholas Phillips, under whom the lessors of the plaintiff claim; for he devised all his other lands in the county of Cornwall to the defendants.

Lawrence,

Laurence, contra, insisted that no part of the tenement in Henron, except the moiety in possession, passed to the lessors of the plaintiff. He admitted that if the devisor had Doz dem. had either of the moieties alone, such moiety would have PHILLIPS passed by this will; but it did not follow that both did. For PHILLIPS. it had been determined, that if a man devise all his lands, such words will pass either his freehold or his leasehold lands, if he has land of only one of those descriptions; but not both. And at the time of making his will, the testator had only one moiety in possession; and he speaks of that only. the testator had two nephews, both of whom seem equally to have been the objects of his will, it is not improbable that he intended to divide the tenement of Henson between them. And no argument can be drawn from the presumption of his not having an intention to make them tenants in common; because he has done that in the case of the three children of one of his nephews.

Supposing a partition had been made, and he had used the same words, there would have been no doubt; and his having an undivided moiety will make no difference. Though the word "purpart" cannot properly be applied to an undivided moiety (for it means that part or share of a tenement, which, having been held by tenants in common, is by partition allotted to any one of them), yet it may without much violence be held, that thereby the testator meant to devise that part which he would have had, had any partition been made. But it will be a very strained construction to hold that, by the words of this devise, the entirety was meant: had that been his intention, he would have used much fitter expressions; for in this case, the devisor was not in want of legal assistance, since he has used technical words.

2dly, as to the words, "reversion and reversions, remain-"der and remainders, rents, issues, and profits thereof; the word "thereof" can only refer to the subject of the last devise, namely, his other lands in the borough of Bodmin. It is not the reversion of the purpart, but of his other lands in Bodmin, which were leased on lives.

Lord MANSFIELD, Ch. J. There is no doubt in this case. The testator meant to give all the interest he had in Henson, whether in possession or reversion. The first words are sufsciently comprehensive to pass the moiety in reversion, as well as that in possession.

WILLES, J. I understand this will in a different sense from the counsel on either side. The vill of Henson consists

agunst

of four tenements: the devisor was in possession of a moiety of three of them; he intended to leave every thing that he Dor dem. had in the vill called Henson to the lessors of the plaintiff; and with that view he devised all that his part, purpart, and PHILLIPS, portion of and in the tenement of Henson. So that here he used the word "tenement" instead of "vill;" because he would otherwise have used the word "tenements." Considering it in that light, if he had intended only to give one moiety, he would have used the word moiety. But without that construction, I am of opinion that the moiety in reversion, as well as that in possession, passed by the first words.

On the other part, the words "reversion and remainder. " &c." are more applicable to an estate where he had a reversion, than to one of which he was seised in fee simple.

ASHHURST, J. I agree with my brother Willes, as to the construction of the word "tenement." And besides, it would be a very narrow construction to say that the moiety in reversion did not pass by the first part of the devise.

But the latter words are still clearer; the "reversion and " remainder, &c." refer to that estate where he had a reversion, rather than to his other lands in Bodmin; for there he had nothing on which they could attach.

Per Curiam. Let the postea be delivered to the plaintiff.

Tuesday. Jan. 31st.

# FARMER and Another against DAVIES.

Where goods were ordered for a ship by the owner before the appointcaptain, though some were not deliverwards, yet as no personal credit was given to the captaiu, he is not answerable for any of them.

A CTION for goods sold and delivered against the defen-A dant, as captain of a ship. This case was tried at the sittings at Guildhall, after last Michaelmas term, before Mr. Justice Buller, when the following case was reserved for the opinion of the Court.

"The goods were ordered by the owners, before the capment of the '4 tain was appointed to the ship. Some of the goods were " delivered before he was appointed; and a cable and other " cordage were delivered afterwards.

"The question is, whether the defendant be liable for the ed till after-" payment of all the goods furnished, or of the goods deli-"vered after he was appointed? If the court should be of! "opinion that he is liable for the whole demand, or for the " cable and cordage after he was appointed, then a verdict to "be entered for the plaintiffs: but if he be liable for none, " then a nonsuit to be entered."

Baldwin,

Baldwin, for the plaintiff. By the general law, every captain is liable for the stores and other necessaries furnished for his ship; because he is entitled to receive the freight, out of .FARMER which he may repay himself.

aguinst DAVIES.

It is laid down in Rich v. Coe (a) and others that a tradesman, who supplies a ship with necessaries, has a treble security; 1st, Against the master of the ship, as making the contract; 2dly, The specific ship; and 3dly, The owners, who are liable in consequence of the master's act.

The owners are liable, whether they give the order or not; and the captain is liable, on taking the goods into his posses-

Dougl. 97. sion.

But if the defendant be not answerable for the whole amount of the goods delivered, he at least is liable for those furnish-

ed after his appointment. He then cited Comb. 116.

Cowper, contra, contended that the plaintiffs could not reover the value of any part of these goods. The case of Rich and Coe makes strongly for the defendant; for it is there said that the master is liable in respect of his contract: but here the captain made no contract. It is not because the captain receives the freight that he is answerable for the stores and necessaries furnished for his ship: that cannot be the true consideration of his liability. For he is equally liable, if at all, though the ship be lost, and when, consequently, he is not entitled to freight. But the real principle is this; if no one but the captain be held forth to the tradesmen, they may resort to him: but if the contract be not made with him, they can only have recourse to the owners. In the present case, the defendant had nothing to do with the contract; the credit was given solely to the owners.

Lord Mansfield, Ch. J. Where a captain contracts for the use of the ship, the credit is given to him in respect of his contract; it is given to the owners, because the contract is on their account; and the tradesman has likewise a specific lim on the ship itself. Therefore in general the tradesman, who gives that credit, debits both the captain and the owners. Now what is this case? The captain made no contract personally. The owners contracted for their ship; the credit was given to them only; and there is not a shadow of colour to charge the captain for any part of these goods.

A nonsuit to be entered (b).

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(a) Comp. 659.

(b) Vid. H. Bl. Rep. C. B. 114.

1786. Tuesday, Fan. 31st.

# WEATHERSTON against HAWKINS.

A servant cannot against his ter for words in giving a bood of the charge; even tho' the master make specific charges of fraud.

HIS was an action on the case by a servant against the defendant, who was his former master, for words, and maintain an also for falsely and maliciously writing and publishing the following letter (stated in the declaration) to one Collier, reformer mas specting the plaintiff's character as a servant; "Two days "I gave him money to go into the city and buy books." When he came home, I desired him to reckon up his acspoken, or a "count; he did so. But being one day more curious than ten, by him, " I sometimes was, I looked over his account, article by " article, and in one, a book I well knew the price of, I found character of " he had charged me one shilling more than it cost, and the servant, " that shilling he kept in his pocket. The next day the very latter prove " same affair. And both these days my neighbour Metcuff the malice as " was in my shop, and knows it well, and said he would not well as fulse- 4 keep such a man a day, or something to that purpose. Two " magazines he charged two shillings for binding; the people " received no more than 1s. 8d. und say he paid no more. This "I can prove."

This was tried at the sittings at Guildhall after last Michaelmus term, before Lord Mansfield, when a verdict was found for the plaintiff on the last count, containing the letter (the words not being proved), subject to the opinion of the

Court on the following case.

"The plaintiff was brother-in-law to Mr. Collier. He "was in the service of the defendant, and was by him "turned away. Rogers, to whom the plaintiff was recom-" mended to be taken as a servant, applied to the defendant " for a character, which not being advantageous, but to the " effect stated in the declaration, he (Rogers) did not take "him. Collier upon this repeatedly called on the defendant; " upon which the letter, stated in the declaration, was writ-" ten with an intent to prevent an action by the plaintiff for " the words spoken by the defendant to Rogers. The writ " was sued out on the same day the letter was written.

"The question for the opinion of the Court is, Whether

" this action lies?"

Wood for the plaintiff. This action is maintainable on the letter, which is a false and malicious libel. This does not

1786.

not differ from the case of common libels; for it has the two essential parts which constitute a libel, namely, slander and falsehood. That it is slanderous is extremely clear, for it WEATHERcharges the plaintiff with specific acts of fraud, almost against amounting to felony. It is likewise false; for had it been HAWKINS. true, the defendant might have justified. And, though in his letter, he said "he could prove it," yet as he did not at the trial, the Court must now take it for granted that it is salse. It is not necessary in an action for a libel to prove express malice: if it be slanderous, malice is implied. on trials for libels, it is sufficient to prove publication; the motives of the party publishing are never gone into. same doctrine holds in an action for words; where, though the declaration allege them to be spoken "falsely and malici-"ously," no express malice need be proved. the word "malitiose" was held to be no error. Noy, 35.

As to the publication; it never has been doubted but that the mere writing of a letter is a sufficient publication, even

though it be written to the party himself.

If it be contended that the master of a servant is exempted from the general rule, on account of his relative situation; such a principle is not warranted by any determination in the And this is very different from the case of a master giving a general bad character of a servant; for here the desendant has made specific charges of fraud.

Bower, for the defendant, after mentioning the case of Edmondson v. Stephenson, Bull. N. P. 8, was stopped by the

Court.

Lord Mansfield, Ch. J. I have held more than once that an action will not lie by a servant against his former master for words spoken by him in giving a character of the servant.

The general rules are laid down as Mr. Wood has stated: but to every libel there may be a necessary and implied justification from the occasion. So that what, taken abstractedly, would be a publication, may from the occasion prove to be none; as if it were read in a judicial proceeding. Words may also be justified on account of the subject-matter, or other circumstances.

In this case, instead of the plaintiff's shewing it to be false and malicious, it appears to be incident to the application by Rogers to the master of the servant. And the letter was written to the brother-in-law of the plaintiff for the express

purpose of preventing an action being brought.

BULLER, J. This is an exception to the general rule on account of the occasion of writing the letter. Then it is incumbent

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cumbent on the plaintiff to prove the falsehood of it. And in actions of this kind, unless he can prove the words to be

WEATHER- malicious as well as false, they are not actionable.

STON On this case it evidently appears that the defendant has against HAWKINS, been entrapped, because the letter was written on the application of the plaintiff's brother-in-law. And, besides, it is stated that the writ was sued out on the same day the letter was written.

Judgment for the defendant.

GROVE and Another, Assignees of LIOTARD, a Bank-Tuesday. Fan. 31st. rupt, against DUBOIS.

HIS was an action for money had and received by the A commisdefendant to and for the use of the bankrupt, before sion del credere is an he became a bankrupt; and for money had and received to absolute enand for the use of the plaintiffs, as assignees; to which the gagement defendant pleaded the general issue, non assumpsit; whereto the principal from upon issue was joined. The defendant also gave a notice of the broker. set.off for money had and received by the assignees for his and makes use. him hable in the first

The cause came on to be tried at the sittings after Michael. instance. A mas Term 1785, before Lord Mansfield, at Guildhall, when broker with such a commission may and costs 1s. subject to the opinion of this Court on the following case. der the gene-

"That the bankrupt, John Liotard, being an underwriter. " subscribed policies filled up with the defendant's name for "his foreign correspondents, who were unknown to the

" bankrupt.

sei-off, un-

ral issue, a

loss upon a policy hap-

pening be-

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by him, and

for which he had debited

the broker:

but such a

loss cannot

be proved

fore a bank-"That losses happened on the policies before the bankan action by "ruptcy of Liotard; that the defendant paid the amount of theassignees if the losses to his foreign correspondents after such bankof the bank- " ruptcy.

"That the defendant had a commission del credere from upon various " his correspondents; was made debtor by the bankrupt for policies un- " premiums; and always retained the policies in his hands.

"The question for the opinion of the Court is, Whether, " under the notice of set-off, or under any of the sta-" tutes respecting bankrupts, the defendant be entitled " to set-off this account with Liotard?

" If the Court shall be of opinion that the defendant is " entitled to set-off, then a verdict to be entered for the deunder a no-

" fendant."

tice of set-off. S. Haywood, for the plaintiffs, relied upon the 28th section of the 5 Geo. 2. c. 30. which requires mutual credit to be given, in order to enable the defendant to set-off; which was not

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GROVE against Dubon.

not the case here; for the credit was not given to the broker, but to the principal; like the common case of insurance brokers, who were nothing more than mere agents, and were always so considered. The case of Wilson and others, assignees of Fletcher v. Creighton and another (a), is in point. That was an action for money had and received, &c. to and for the use of the bankrupt, and to and for the use of the assignees, and on an account stated the defendant pleaded the general issue, non assumpsit, and gave notice of set-off; That the plaintiffs were indebted to the defendant in 3000/. for losses upon several policies of assurance underwritten by the bankrupt, and which losses happened before the bankruptcy. It was tried before Lord Mansfield at Guildhall, at the sittings after Easter Term 1782, when the jury found averdict for the plaintiffs, subject to the opinion of the Court on the following case: "That the defendants had con-"siderable dealings with the bankrupt, as agents or factors to "various correspondents. That they paid to him, or were "debited by him for, premiums upon insurances on behalf of "those correspondents. That they had credit for the losses "as they happened, and for the returns of premium. That "they had no commission del credere. That none of the "correspondents for whom they insured were insolvent; but ' "to all, except one, they were in advance, more or less, on "account of the policies." In that case the Court were all dearly of opinion that under those circumstances the defendants were not entitled to set-off any of the subsequent losses to an action brought by the assignees for the recovery of the premiums debited to the defendants by the bankrupt.

The only difference between that case and the present was the circumstance of the defendant's having a commission del credere from his correspondents. It is material then to see, whether any, and what, difference such a commission could make, as between these parties.

A commission del credere might be considered several ways. It is an undertaking by the broker, for an additional premium to insure his principal against a contingency, which contingency is the failure of the underwriter; and therefore it is only to be considered as a collateral security, which vested no such interest in the policy, as the broker could have proved under the commission at the time of issuing it; much less

(a) Trin. 22 G. 3 B. R.

GROVE GROVE Against

Dupois.

did it vest any interest in him at the time of making the pa-

licy. Ex parte Adney. Cowp. 460.

The broker could not have brought an action in his own name upon such a policy, without averring the interest to be in the principal (a), by which it would have appeared that no credit had been given to him, and consequently that he did not come within the meaning of the 5 Gea. 2. c. 30. s. 28. If therefore he could not have brought an action in his own right, and had not such an interest in the policy as would have enabled him to have proved his debt under the commission at the time of it's issuing, it is absurd to say that he could set it off to a clear demand which accrued before the bankruptcy. Chilton v. Wiffin and another, 3 Wils. 13. Goddard v. Konderhaven, 3 Wils. 262 (b).

But even supposing an interest vested in the broker, and he could have brought an action in his own right, yet he could not set-off the present demand; for in fact there was no debt existing at the time of the bankruptcy. The payment was made to the principal afterwards; and at any rate the broker's claim could not arise before such payment. This comes directly under the principles uniformly laid down in the cases last cited. No particular event had then happened to fix the broker; no demand had been made on the underwriter, and refusal. It does not appear upon this case but that it was a voluntary payment; and if the defendant paid this sum before the expiration of the time which was allowed to him, he ought not to be permitted to take advantage of his act in prejudice to the rest of the creditors, and set-off this debt.

The broker was in the nature of an assignee of a bond, or indorsee of a promissory note. And it was determined in the case of Marsh and another, assignees of May, against Chambers (c), that a note, indorsed to the debtor of a bank-rupt after the bankruptcy, could not be set-off. So here, whatever interest the broker had in the policy as against the plaintiffs, it accrued after payment of the loss to his principal; but that interest, being transferred subsequent to the bank-ruptcy, could not be set off against a debt vested before. At all events, it was setting up a debt in right of another person against a personal demand upon himself.

That upon the whole, whatever difference the commission del credere might make between the broker and his employers.

<sup>(</sup>a) Vide 19 Geo. 2. c. 37. 3 Wile. 346.

<sup>(</sup>b) Vide Young and another v. Hockley, (c) 2 Stra. 1234.

it could make none between the present parties. The transaction between them would have been exactly the same, if no such commission had existed; and it was too much to contend that a private agreement between two of the parties, without the knowledge of the third, should vary the nature of the contract, and materially affect and injure the rights of his creditors.

GROVE against Dybots.

Smith, contra, distinguished this case from that of Wilson and another, assignees, against Creighton; for here, the broker was the only person who had any dealings with the bankrupt: his name alone was inserted in the policy; no other person was known to the bankrupt, who must therefore have treated with him as principal; and who, it was more natural to suppose, gave the credit to him, than to any other person, to whom, from the nature of the transaction, he must have been an utter stranger.

He observed that this case was very different from that of sureties; for there the obligee relied upon the principal; the whole dealing was with him; and he only looked to the other as a collateral security: but here the broker was liable in the

first instance.

He was then stopped by the Court.

Lord Mansfield, Ch. J. The whole turns on the nature of a commission del credere. Then what is it? It is an absolute engagement to the principal from the broker, and makes him liable in the first instance. There is no occasion for the principal to communicate with the underwriter, though the law allows the principal, for his benefit, to resort to him as a collateral security. But the broker is liable at all creats.

BULLER, J. I remember many actions brought at Guild-bell against brokers with commissions del credere; and I never heard any enquiry made in such cases, whether there had been a previous demand upon the underwriter and refusal: and I can venture to say, that such is not the practice. It makes no difference at the time of making the policy, whether the underwriter knew the principal or not; he trusted to the broker; the credit was given to him, and not to the other.

I agree that the notice of set-off is bad: but this loss may be proved and set-off under the general issue of the 28th section of the 5 Geo. 2. c. 30. The words of that section are, "That where it shall appear to the commissioners, or the major part of them, that there hath been mutual credit

" given

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"given by the bankrupt and any other person, or mutual "debts between the bankrupt and any other person, at any " time before such person become bankrupt, the said com-" missioners, &c. shall state the account between them, and " one debt may be set against another, and what shall appear " to be due on either side on the balance of such account. " and no more, shall be claimed, and paid on either side respec-" tively."

Therefore we see by this section of the statute that the assignees could legally claim no more than the balance upon

the account between the parties.

Judgment for the defendant (a).

(a) Vid. Bize v. Dickason and another, Assignees of Barteneblag, post. 285.

Tuesday. Yan 31st.

## PUGH against ROBINSON.

HIS was an action on promises by bill. The declara-

A declaration entitled the term, relates to the first day the breach, being laid on the first day of the term, may ration, because by a reference to the ancient practice of tenus, the declaration cannot be supposed to

the court on that day.

L tion, which was entitled generally of Michaelmas Term, generally of stated the promises, and the breach thereof, to have been made on the seventh of November 1785. To this declaration there was a special demurrer; and the of the term: causes assigned were, " For that the said declaration appears and the pro-" to be exhibited, and is entitled, of Michaelmas Term gene-"rally, whereby it has relation to, and must be deemed a "declaration of, the first day of that term; whereas the " said several promises, in the said declaration mentioned. " are all of them therein laid to have been made by the said be presumed " Richard (the defendant), and the said several causes of acto have been "tion therein also mentioned to have arisen, on the seventh made before "day of November in the year of our Lord 1785; which said of the decla-" seventh day of November was a day after the first day of "that same Michaelmas Term, wherein the said Mary 6the "plaintiff) hath so declared against him the said Richard. " and whereof the said declaration is so generally entitled as " aforesaid. . And also for that the said declaration, by the declaring ore " memorandum thereof, appears to have been exhibited be-" fore any of the causes of action of the said Mary therein "mentioned appear to have accrued, &c." Law, in support of the demurrer, contended, that the day

nave been delivered till of making the promises mentioned in the declaration must the sitting of be consistent with the memorandum; but it appears on

this declaration that the cause of action accrued subsequent to the time of filing the bill. Filing a bill generally of such a term relates to the first day of that term. And there being no fraction of a day in judicial proceedings, the filing of the bill must relate to the first instant of that day; here then this bill must be taken to have been filed on the first instant of the 7th November; and even admitting that the promise was made on the same instant of that day, yet the breach must necessarily be subsequent to it in point of time. Though, on motions in arrest of judgment, and on trials at Nisi Prius, the Court will enquire when the bill was actually filed, yet they will not on demurrer where such enquiry is precluded. He cited 2 Lev. 141 176. Bull. N. P. 137. Lord Porchester's case, Tr. 23 Geo. 3. B. R.

1786.

Shepherd, contra, admitted that, if it appeared that the cause of action arose after the filing of the bill, the declaration was informal. But though in this case it refers to the 7th of November, which was the first day of the term (a), yet the term, for the purpose of delivering the declaration, cannot be considered to commence till the sitting of the Court. This is evident on adverting to the ancient practice of the Court, when the parties declared ore tenus (b), which was minuted by the prothonotary; but on account of the great increase of business the present mode of delivering the detlaration in writing was substituted in lieu of it. It is therefore clear that this declaration cannot be supposed to have been delivered before the sitting of the Court; for till that time, by the old practice, the parties could not have declared ore tenus. And though the law does not in general allow of fractions of a day, yet the Court will take notice of their usual time of sitting; before which time the contract might have been made and broken; and then the declaration may well be supported. Symons and Low, Sty. 72.

ASHHURST, J. The Court ought to make any intendment against a mere captious objection. We must resort to the old practice of declaring ore tenus; and by referring to that, we find that the declaration could not have been delivered till the sitting of the Court. And then it is as probable that the promise was made before the declaration as afterwards.

BULLER, J. The case of Lord *Porchester* does not apply here: there were two judgments in that case, and the question R tion

(a) 24 G. 2. c. 48.

(b) Gilb. G. P. 44.

1786. Pugn against ROBINSON.

tion was whether the Court could say that one judgment had precedence of the other: but as they both referred to the same day, the Court held that the priority of one could not be averred. Here, however, the question is not concerning a judicial proceeding; for the delivery of the declaration is the act of the party: and it appears by the course of the Court (which we are bound to take notice of according to the case in Lev. (a), that in ancient times the parties could not declare till the sitting of the Court. So that here the promise and the breach may well have taken place before the delivery of the declaration. The case in Styles is very

Demurrer over-ruled; but the Court gave the defendant

leave to amend, on payment of the costs.

(a) Lev. 176.

Tuesday. Yan 31st.

## KIRK against NOWILL and BUTLER.

quantity of forks, the property of the plaintiff.

The defendant pleaded, 1st, the general issue.

THIS was an action of trespass for seizing and taking a

A corporatio, created by letters patent, with a power of laws, cannot make incur a for-. ther can a corp ration created by less such a power be expressly given.

The second plea stated, that the town of Sheffield, in maning bye which the said trespass is supposed to have been committed. was within the lordship and liberty of Hallamshire in the any laws, to county of York. That the Company of Cutlers was incorporated by stat. 21 Jac. 1. c. 31. That that act directed that feiture; net-one master, two wardens, six searchers, and four and twenty assistants, should be annually chosen out of the said company to govern the said corporation. That it was by the act of parlisaid act of parliament further enacted, "That no person ament, un- " or persons using the said arts or manufactures within the " liberty of Hallamshire, or six miles compass of the same, " should at any time hereafter make, or cause to be made, "any knives, or knife-blades, shears, scissars, or sickles, " except he or they did put steel into the edges of them, up-" on pain to lose for every such offence 10s. and the wares "so deceitfully made; to be seized and recovered by the "master and wardens of the said company for the time be-" ing, and to be levied, distributed, and employed to the " use of the said corporation, to and for the relief and benefit " of the poor of the said corporation." And that the forks mentioned in the declaration were forfeited and seized under the act.

The

1786.

Kirk against

Nowsel.

The third plea set forth the incorporation of the said company by the said act of 21 Jac. 1.; that it was, by the said act, further enacted, "That no person using the said mys-"tery or crafts, or any of them, within the said lordship or "liberty, or six miles compass thereof, should at any time "thereafter strike, grave, or use, upon his knives, or the "wares before mentioned, any more marks than one, and "that to be such as should be first appointed as aforesaid " unto him by the said master, wardens, and searchers of the " said company for the time being, or the greater number "of them; upon pain to forfeit and lose, for every time that "he should offend therein, all such goods so marked, and "the sum of 40s. to the master and wardens of the said "company for the time being, to be employed to the use of "the said corporation to and for the relief and benefit of "the poor of the said corporation;" and that the forks mentioned in the declaration were forfeited and seized un-

der that act." "That the said plaintiff ought not to have or maintain his "said action thereof against them, because they say that the "town of Sheffield, in which the said trespass is above sup-

4thly, And for further plea, &c. the defendants say, "posed to have been done, is, and at the respective times "hereinafter mentioned, and also at the said time when the "said trespass is above supposed to have been done, was, a "certain place, situate and being in and parcel of the lord-"ship and liberty of Hallamshire in the said county of York, "and mentioned in the act of parliament and bye-law here-"inafter mentioned. And the said defendants further say, "that by a certain act of parliament made and passed in the a parliament of the late king James 1. at a session thereof holden at Westminster in the one and twentieth year of his "reign, entitled 'An act for the good order and govern-" ment of the makers of knives, sickles, shears, scissars, "and other cutlery wares, in Hallamshire in the county of " Tork, and the parts near adjoining," it was enacted (among "other things) by his said late Majesty, the Lords Spiritual "and Temporal, and the Commons in that parliament as-"sembled, and by the authority of the same, That all per-"sons using to make knives, blades, scissars, shears, sickles, "cutlery wares, and all other wares and manufactures, made "or wrought of iron and steel, dwelling or inhabiting with-"in the said lordship and liberty of Hallamshire, or within "six miles compass of the same, should be from thence-"forth and thereafter might be in deed, and in name, one "body politic, perpetual, and incorporate, of one master, "two wardens, six searchers, and four and twenty assistants

KIRK against NowILL.

"and commonalty of the said company of cutlers of the "lordship of Hallamshire in the county of York. And that " they, by the name of master, wardens, searchers, and as-"sistants, and commonalty, of the company of cutiers of " Hallamshire in the said county of York, might be, and by "virtue of the said act, were really, actually, and fully in-"corporated, created, made, and erected one body corpo-" rate and politic, to all intents and purposes, and should " have perpetual succession, and be called and known by the "name of master, wardens, searchers, and assistants, and " commonalty of the company of cutlers in Hullamshire in " the county of York. And further, that it might be for ever "thereafter lawful to the said master, wardens, searchers, "and assistants, in and upon the feast day of St. Barthoe " lomew the Apostle, in every year, yearly, or at any other "time in the year, to nominate, elect, choose, and swear, "one master, two wardens, six searchers, and four and "twenty assistants, to be chosen out of the said company. " to order, rule, and govern the said corporation and com-"pany of cutlers during the term of one whole year then " next ensuing, and until there should be others chosen in "their room. And for the due ordering and better main-4 taining of the said company, and for the better relieving "and employing of the poor of the said trade, it was or-" dained and enacted by the authority aforesaid, that it "should and might be lawful to and for the said master, "wardens, searchers, and assistants of the company of cut-" lers aforesaid, or the greater part of them, and their suc-" cessors from time to time, to constitute, ordain, make, and " establish, such laws, acts, orders, ordinances, and consti-"tutions, which the said master, wardens, searchers, and " assistants, or the greater part of them, according to their "discretions, should be good, wholesome, profitable, honest, " and necessary, for the good order, rule, and government " of the said master, wardens, searchers, and commonalty " in their several arts aforesaid, and of all other their ap-" prentices and servants in the same arts, manufactures, " and professions aforesaid; so that the said ordinances and " constitutions were not any way repugnant and contrary "to his Majesty's royal prerogative, or to the laws of this " realm. And that the said master, wardens, searchers, " and assistants of cutlers aforesaid, or the greater part of "them, having made such laws, institutions, ordinances, " and constitutions, might appoint and impose such reasonable " pains, punishments, and penalties, by fine or amerciament, or " by either of them, upon all those which they should find " offending

"offending contraryto those laws, acts, orders, ordinances, "and constitutions, as unto them the said master, wardens, "searchers, and assistants of cutlers, or the greater part of "them, should be thought meet and convenient, according "to the quality of the offence: and the same fines and amer-"ciaments to levy, receive, and have, to the use of the said "corporation, to and for the relief and benefit of the poor "of the said corporation, as by the said act of parliament " (among other things) more fully appears. And the said "defendants further say, that after the passing of the said " last-mentioned act of parliament, and long before the said "time when, &c. to wit, on the 31st day of July 1780, at "Sheffield aforesaid, in the county aforesaid, the master, "wardens, searchers, and assistants of the said company for "the time then being, for the good order, rule, and govern-"ment of the master, wardens, searchers, and commonalty, " of the said company in the said several arts, did ordain, "make, and establish a certain, good, wholesome, profi-"table, honest and necessary bye-law, act, order, and con-"stitution, and did thereby (amongst other things) ordain, "order, and establish, that it should and might be lawful "to and for the searchers of the said corporation or company "for the time being, or any three or more of them, at all "times thereafter in the day-time, to enter into the respec-"tive workshops and warehouses of any the respective mem-"bers or freemen of the said corporation or company with-" in the said lordship or liberty, or six miles compass there-" of, to search for deceitful and unworkmanly cutlery wares, "and other wares, made or wrought of iron or steel, and "all such deceitful and unworkmanly wares as should be "there found upon such search, to seize, take, carry away, "break, and destroy; and the iron and steel thereof com-"ing to sell and dispose of for the relief and benefit of the "poor of the said corporation, as by the said bye-law, act, "order, and constitution more fully appears. And the said "defendants further say, that the said bye-law, act, order, "and constitution, so made as aforesaid, afterwards, to " wit, on the first day of August 1780, at York, in the coun-"ty aforesaid, was examined and approved of by the Right "Honourable Alexander Lord Loughborough and Sir Beau-"mont Hotham, Knight, two of his Majesty's justices of "assize for the Northern circuit, at the assizes held at Tork, "in and for the said county of York, on the 29th day of " July 1780, according to the form of the statute in that "case made and provided. And that the said bye-law, act, " order.

KI K against Nowsell.

KIRK against Nows. L.

" order, and constitution, afterwards, that is to say, on the " same day and year last aforesaid, at Sheffield aforesaid, " within the liberty of Hallamshire aforesaid, was duly pub-" lished and made known. And the said defendants further " say, that after the making of the said act of parliament "and hye-law, to wit, at the meeting of the then master, "wardens, searchers, and assistants of the said company, " held at Sheffield aforesaid on the 26th day of August 1784, "the same being a convenient time of the year for that pur-" pose, one William Fowler, the then master, together with "the then wardens, searchers, and assistants of the said "company, did nominate, elect, and choose the said Tho"mas Newill, together with one Thomas I illetson, one Jo-" seph Ward, and one William Smith, to be four of the searchers of the said company for the year then next enst suing, to order, rule, and govern, the said corporation "and company of cutiers during the term of one whole "year then next ensuing, and until there should be others " chosen in their room, according to the form and effect of the said last-mentioned act of parliament. And the said "Thomas Nowill, Thomas Tillotron, Joseph Ward, and "William Smith, afterwards, to wit, on the 2d day of Sep-" tember, in the year last aforesaid, at Sheffield aforesaid, "were duly sworn to execute the said office of searchets." " and then and there took upon themselves the burdew of the " same office, and became, and at the same time when &c. "were and still are such searchers as aforesaid. And the " said Thomas Nowill, Thomas Tillotson, Joseph Ward, and William Smith, being such searchers as aforesaid, he the " said Thomas Nowill, together with the said Thomas Til " lotson, Joseph Ward, and William Smith, three of the o-"ther searchers of the said company as aforesaid, and the "said Joseph Butler as their servant, and by their command, and in their aid and assistance, at the said time, " when, &c. the same being in the day-time, did enter into " a certain work-shop of one Matthew Devenport, then situ " ate and being at Sheffield aforesaid, within the said liberty " of Hallamshire, in the said act mentioned, he the unic " Muthew Davenport then and there being a member of the " said corporation, to search for deceitful and unworkmanh " curlery wares, and then and there found the said forks if "the said declaration mentioned; and because the said of forks were then and there deceitful and unworkmanly cat "lery wares, (that is to say, made of cast iron, and brittle "weak, and badly tempered,) the said Thomas Nowill, to " gethe

in Kirk agains Nowill

"gether with the said Thomas Tillotson, Joseph Ward, and "William Smith, the searchers aforesaid, and the said Fo-" seph Butler, as their servant, and by their command, and in "their aid and assistance, at the said time when, &c, seiz-"ed, took, and carried away, the said forks; and after-" wards, to wit, on the same day and year last aforesaid, at "Sheffield aforesaid, delivered the same to the master and "wardens of the said company, to be broken by them, and "the iron thereof coming to be employed to the use of the " said corporation, for the relief and benefit of the said cor-"poration, as it was lawful for them to do for the cause a-" foresaid; which are the same seizing, taking, and carrying "away the said goods and chattels in the said declaration "mentioned, and converting and disposing thereof to their " own use by the said Thomas Nowill and Joseph Butler abov " supposed to have been done, whereof the said plaintiff hath " above complained against them, &c."

Replication took issue on the first plea.

To the 2d, 3d, and 4th pleas, the plaintiff replied de injuria sua propria; and the issues thereon.

Verdict for the plaintiff on the three first issues, and for

the defendants on the last.

Wilson obtained a rule, last Term, to shew cause why judgment should not be entered for the plaintiff in this cause on the general issue, and the two first justifications notwithstanding the verdict for the defendant on the last justification, the same justification being sufficient in law.

This motion was obtained upon two grounds;

1st, That a power, claimed by a corporation of creating bye-laws to incur a forfeiture, was bad in point of law (a), unless founded on an ancient custom within a city, or unless such power was expressly given to them by act of parliament, 2 Inst. 47. and 8 Rep. 125.

2dly, That the statute, on which this bye-law was founded, had appointed a specific punishment for the offence which had been committed, viz- by fine or amerciament, which preclu-

ded the corporation from inflicting any other.

Sir Thomas Davenport, Lee, and Chambre, now shewedtenes, and argued upon the distinction between corporations created by letters patent, and by act of parliament. That the cases cited only tended to shew that no forfeiture could grow by letters patent; but that this corporation was created by act of parliament, which had given them the power of inflicting such a penalty. For though that particular

(e) Vid. 1 Wils. 63; Barn. 133. 267.

KI K against Nowill.

part of the act, which was stated in the 3d plea of justification, did not shew an express power given to them of seizing the wares in question under the act, yet such an authority was clearly founded upon other parts of it, which were set forth in the two first pleas of justification on this record; by which it appears that persons residing within the limits of the corporation were prohibited from making any knives, &c. unless they put steel into the edges of them, and fixed the proper marks upon them, "upon pain to lose, for every "such offence, ten shillings in the one case, and 40 shillings in the other; and the wares so deceitfully made to be seized and recovered by the master and wardens of the said "company, &c."

That all acts relative to trade being public acts, and this being such an one, the Court were bound to take notice of every part of it, even though it were not verbally set forth.

4 Co. 76.

But supposing that the Court could not go out of the third plea of justification, yet there was enough of the statute set forth in that plea to warrant the bye-law, under which this seizure was made. It appeared from thence that the company of Hallamshire were empowered to make bye-laws, and to enforce them by fine or amerciament; and a forfeiture of this kind might be considered in the nature of a fine, equivalent to the value of the goods. Such a construction was agreeable to the spirit of the statute, and to the purposes for which it was enacted. And then this bye-law was not unreasonable; which was a strong circumstance in its favour. 1 Mod. 202. 2 Mod. 56.

The counsel on the other side, Wilson, Wood, and Law,

were stopped by the Court.

Lord Mansfield, Ch. J. A corporation, in the definition of it, is a creature of the Crown, created by letters patent; and such a corporation, with a power of making byelaws, cannot make any such law to incur a forfeiture. Those corporations, which are created by act of parliament, have no other additional powers incident to them, than those have which are created by charter, unless they be expressly given. No such extraordinary power of making bye-laws to incur a forfeiture appearing upon this plea to have been conferred, it is impossible for the Court to say, that this bye-law can be supported by the act.

BULLER, J. This bye-law is bad, considered in every

point of view.

Taking it generally as a bye-law, creating a forfeiture; the act of parliament not having given this corporation a power to make such a bye-law, it is bad on that ground.

Then

Then, it has been said that this bye-law is supported by the act: but so far from it, they have expressly negatived such a power; for the act prescribes in what terms bye-laws shall be enforced, namely, by fine or americament; therefore the corporation is precluded by the act from inflicting any other punishment.

KIRK against Nowill.

There never was such an idea before, as the counsel against the rule have suggested, that one plea might be supported by what was contained in another. Each plea must stand or fall by itself; they are as unconnected as if they were on separate records. And though it be true that acts of parliament relating to trade in general are public acts, yet a statute which relates only to a certain trade is a private one. Therefore the Court cannot now take notice of any other part of this act of parliament than that which is set out in this plea; for it is not a public act.

Rule, for the plaintiff to have leave to enter up judgment notwithstanding the last plea, absolute (a).

(a) Vid. post. 266.

# The KING against THOMAS SPENCER CROWTHER. Wednesday. Feb. 1st.

HIS was a conviction before a justice of the peace on Conviction the statute 5 Ann. c. 14. for using a gun. After stat. on 5 Ann. c. ing the information, which negatived specifically every one because the of the qualifications in the 22 & 23 Cur. 2. c. 25. it pro- witness was creded to state that "On the same 14th day of the same not sworn "month of September 1785, at the parish of Sevenoak, in the and examination of Kent, one credible witness, to wit, Edward sence of the "Tye, came before me the said justice, and by his depo- defendant. "sition taken in writing before me the same justice upon his It is not suf-"atton taken in writing before the the same justice upon his ficient to "anth on the Holy Gospel to him then and there by me read over the "the aforesaid justice administered, swore, and upon his deposition in "outh aforesaid affirmed, and said, that the aforesaid Thomas the defend-"Spencer Growther, on the 8th day of September aforesaid, ant's prein the year aforesaid, at the parish, &c. did keep and use evidence need "a gun and certain dogs called setting dogs or pointers, to not negative "kill and destroy the game, and hunted them over certain every specigrounds, part of Bluck Hall Farm, in the parish aforesaid, tion under "Ec. and did then and there shoot at and kill one partridge the 22 & 23 "with his said gun, against the form of the statute in such Car. 2. c. 25, "case made and provided. And afterwards, that is to say, Vol. I.

against CROWTHER.

" on the 15th day of September, in the year aforesaid, he the " said Thomas Spencer Crowther, having been duly summon-The King " ed in this behalf, appeareth before me the justice afore-" said, and is present, in order to make his defence against "the said charge; and having heard the same, and the " aforesaid deposition of the said Edward Tye having been " read over again unto the said Edward Tye in the presence " and hearing of the said Thomas Spencer Crowther, and the " said Edward Tye having again affirmed his said deposition to " be true in the presence and hearing of the said I homas Spencer " Growther, he the said Thomas Spencer Crowther is asked by " me, the said justice, if he can say any thing for himself. " why he the said Thomas Spencer Crowther, should not be " convicted of the premises above charged upon him in the " form aforesaid: whereupon the said Thomas Spencer Crow-"ther saith that he is not guilty of the said offence; but he "doth not produce to me any evidence whatsoever that he " is in any manner qualified, allowed or authorised, by the "laws of this realm, to have, use, or keep for himself, or " any other person or persons, any gun, setting dog, pointer, " or any other engine to kill and destroy the game of this "kingdom. And thereupon it manifestly appearing to me " that the aforesaid Thomas Spencer Crowther is guilty of "the said offence charged upon him in the said informa-" tion, I do therefore hereby convict him of the offence afore-" said, and do declare and adjudge that he the said Thomas " Spencer Crowther hath forfeited the sum of 51, for the pf-" fence aforesaid, &c."

Bond now moved to quash this conviction, on the two fol-

lowing grounds;

1st. That the evidence on which the conviction was founded was not given in the presence of the defendant : for on the defendant's appearing before the justice, the witness only af-firmed his deposition to be true. It was a principle in our law that the evidence must be given in the presence of the defendant, that he might have an opportunity of cross examining the witness. The King against Vipont and others, 2 Burr. 1163.

2dly. The qualifications required by the statute 22 & 23 Car. 2. c. 25. were not negatived by the evidence. The evidence was only general, that what he did was " against the "form of the statute in such case made and provided." It ough t

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THER.

ought to have been as special as the information itself. Mr. Justice Denison says, "the evidence and adjudication ought "both of them to be. That he has not these qualifications, The King "which are specified in that act, nor any of them." Rex v. Jarvis (a). And by Ashhurst, Justice, in the case of The King against Wheatman (b), " The evidence must prove, but " cannot supply any defects in, the information."

He also cited Andrews, 240. and Bluet qui tam v. Needs,

Gomyns, 525.

Mingay, contra, contended, that this differed from the case of The King against Vipont; for the deposition of the witness, having been read over in the defendant's presence, was affirmed by the witness to be true, and was the same as if he had been re-sworn. As to the second objection—it was only stated in the information against Jurvis that he was not qualified generally; and the Court said that the information ought to have negatived every separate qualification. It had done so in the present case, and was so stated in the conviction; and there was no occasion to prove it by evidence. It was impossible to bring evidence to prove the want of each qualification negatively. If the information be specific, a general deposition, that he is not qualified, is sufficient to put the defendant upon proving that he was.

Per Curiam. The first objection is good; the witness ought to have been re-sworn in the defendant's presence. As to the other point-there is no case in which it has been directly decided that the evidence should negative every particular qualification. It cannot be so from the nature of the

case (c).

Conviction quashed.

(a) 1 Bur. 154.

(b) Dougl. 332.

(c) Vid. post. 145.

### ROBERTSON against EWER.

Saturday. Feb. 4th.

a ship.

"HIS was an action tried before Buller, J. at the sittings Seamen's after last Michaelmas Term, at Guildhall, on a policy wages and of insurance on the ship Dumfries " from London to the provisions "coast of Africa, during her stay and trade there, and at embargo (a) "and from thence to her port or ports of discharge in the are not co-" British West India islands." vered by an insurance on On the body of

(a) Vid. Brough v. Whitmore, post. 4 vol. 206,

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ROBERT-SON aguinst EWER. On a motion to set aside the nonsuit entered in this cause, and to grant a new trial, the following facts appeared:

That the ship sailed on her voyage to the coast of Africa, at which place she took in a cargo of slaves, and proceeded from thence to the island of Barbadoes, where she arrived on the 18th of December 1781. That an embargo had previously been laid on all shipping by Lord Hood the commander in chief upon that station. That, notwithstanding this, the captain of the Dumfries attempted to sail on the 21st of December 1781, but was prevented: on this, application was made by him for permission to sail, which being refused, a few days afterwards he sailed without leave; and thereupon Lord Hood dispatched the Salamander sloop of war in chase of the vessel, which brought her back after a trifling engagement (the damage being less than 3 per cent.) Upon her return, Lord Hood, in consequence of this breach of embargo, ordered all the men to be taken out and dispersed on board his Majesty's ships of war. That the embargo continued till the 7th of January 1782. That on the 22d of the same month, the small-pox broke out amongst the slaves, who were all obliged to be put on shore. In consequence of which, and for want of mariners to navigate the vessel, she was detained at Barbadoes above two months after the embargo was taken off. That the ship then sailed to Yamaica, which was her last port of discharge.

This action was brought to recover the amount of wages and provisions, in consequence of her detention under the

embargo at Barbadoes.

On the trial, Mr. Justice Buller was opinion that this policy being upon the body of the ship, and the average loss thereon being less than 3 per cent. the plaintiff could not recover.

Lee, Cowper, and Wood, in support of the rule, made two

points.

1st. That this loss was insured against under that part of the policy, which provides for all arrests, restraints, and detainments of all kings, princes, and people of what nation soever. And the detainment, in this instance, being by the king's ships, makes no difference; the damage is exactly the same to the owner, which is the event insured against. Suppose the embargo had been laid on for a greater length of time, in consequence of which the ship had become worm-eaten,

the assured might have abandoned, and come upon the underwriter for the loss. In the case of Goss and another against Withers (a), Lord Mansfield said, "that by the general law, "the insured may abandon in the case merely of an arrest "on an embargo by a prince, not an enemy." If then the plaintiff had a right to abandon, and recover the whole value, if he chose to continue his voyage, he certainly might recover an average loss for so much of the damage as was actually sustained.

1786. ROBERT-80 N against Ewer.

2dly. The plaintiff is entitled to recover upon this policy, as upon a loss sustained in consequence of the barratry of the master. There can be no doubt but that his resistance to an embargo lawfully laid on was an act of barratry. Hence all the damage which has accrued to the owners. The captain, by his conduct, subjected the ship to be stripped of all her men, and thereby rendered her unable to prosecute her voyage; so that it was as great a loss to the body of the ship, in respect of working her, as if the masts and rigging had been cut away, and as much to the detriment of the owners.

It is not necessary that the damage should be an immediate one to the ship; it is sufficient, in order to charge the underwriters, if the loss happen in consequence of any peril insured against. In the case of a ship ransomed, the loss is the payment of the money; there, no actual damage is done to the body of the ship; and yet the insurer is liable on his undertaking. Or if a ship be sunk, and afterwards weighed up, the underwriter would be answerable for any expence incurred in weighing her up, as a consequential damage, though perhaps the body of the ship sustained no actual biurv.

Suppose the embargo had been taken off the next day after this act of the master, the vessel could not have sailed for want of her crew. And it cannot be contended, that from the time the embargo was taken off, she was detained on account of sickness; for the embargo was taken off on the 7th of January, and the small-pox did not break out till the 22d, so that she might otherwise have sailed during that interval; and therefore all the subsequent losses accrued in consequence of such act of barratry against which the def ndant had undertaken to indemnify the owners.

Erskine, contra, relied on this being a policy on the body of the ship, which had completed her outward-bound voyage, without

(a) 2 Burr. 696.

ROBERT-SON against

without receiving any damage. The only loss, which was attempted to be proved on the trial, was a loss upon the voyage in consequence of the embargo which was laid on at Barbadoes. The freight wast answer this: but it was not within the perils insured against by the defendant.

That the act of the master did not amount to barratry, because what he had done had been intended for the benefit of the owners; much less could the loss be called such an immediate consequence of the barratry as to bring it within this policy. It was laid down by Lord Mansfield, in a late case at Guildhall (a), That wherever a risk is insured against,

(a) Jones & Schmoll, sittings after Trinity Term, 1785, at Guildhall. It was an action on a policy of assurance, " At and from Brutol to the coast of Africa, " during her stay and trade there, and from thence to her port or ports of dis-" charge in the West Indies." There was a memorandum on the p licy, that, "The assurers are not to pay any loss that may bappen in boats during the voyage " (mortality of negroes by natural death excepted); and not to pay for mortality ty mutiny, unless the same amount to 101, per cent, to be computed upon the first " cost of the ship, outfit, and curgo, valuing negroes so lost at 351 per head" demand upon the policy was the loss of a great many slaves by mutiay. The evidence of the captain was, that he had shipped 225 prime slaves on board; That on the 3d of May, before he sailed from the coast of Africa, an insurrection was attempted. That the women seized him on the quarter deck, and attempted to throw him overboard. That he was rescued by the crew. That the women and some men threw themselves down the hatchway, and were much bruised. That he sent the ringleader on shore. That twelve men and a woman afterwards died of those bruises, and from abstinence. That on the 22d of May, there was a general insurrection, the crew were forced to fire upon the slaves and attack them with weapons. It was a case of imminent necessity. Several slaves took to the ship's sides, and hung down in the water by the chains and ropes, some for about a quarter of an hour . three were killed by firing, and three were drowned; the rest were taken in, but they were too far good to be recovered; many of them were desperately bruised; many died in consequence of the wounds they had received from the firing during the mutiny; some from swallowing salt water; some from chagrin at their disappointment, and from abstinence; several of fluxes and fevers; in all to the amount of 55, who died dufing the course of the voyage.

The underwriters had paid at the rate of 15 per cent. for 19, who were either

killed during the mutiny, or had afterwards died of their wounds.

Bearcroft, for the plaintiff, contended, that though the rest did not actually die in the mutiny, or from any wounds received at that time, yet they had all died in consequence of the mutiny; for if there had been no mutiny, nothing of the kind would have happened, and that on this ground the underwriter ought to be liable.

He stated another consequential loss, which was, that the very circumstance of there having been a mutiny amongst the remaining slaves had so far issues their value in the estimation of the planters, that they were sold at 171. a head less than they would otherwise have done; that on this circumstance also he had no doubt but the plaintiff was entitled in point of law, to recover against the underwriter.

Lord MANSFIELD, Ch. J. I think not. I think the underwriter not answerable for the loss of the market or the price of it; that is a remote consequence, and not within any perd insured against by the policy.

The question for the jury will be, whether any of those who died by any other means, except their being fired upon, or in consequence of the wounds

in order to recover upon the policy, the loss must be a direct 1786. and immediate consequence of the peril insured, and not a remote one. Suppose this vessel had been driven by a violent Robertstorm into the island of Barbadoes, and on her arrival there had been put under an embargo, and any loss upon the voyage had arisen to the owners; if the ship had afterwards performed her voyage, it could not be contended that the insured could have recovered such damage, as consequential to the storm, which was a peril insured against.

50 ¥ against EWER.

He cited a case, directly in point, of Fletcher against Pole, tried before Lord Mansfield, at the sittings after Easter Term 1769. at Guildhall. That was an insurance on the ship Tartur, "at and from London to Newcastle and Marseilles, and "at and from Marseilles to her port and ports of discharge "in the West Indies." In the course of that voyage the ship having met with very tempestuous weather, was obliged to put into Port-Mahon, in Minorca. On her arrival there the captain obtained leave of the Vice-Admiralty Court to have the ship surveyed, in consequence of which she was detained there for a considerable time.

Part

sad braises which they received during the struggle, are within the meaning of that policy, which insures against damage by mutiny. It is not a law question: I know of no law upon the subject; the jury must fix the rule, as the question arises upon matter of fact. Some of them died in consequence of the insurrection failing: those certainly cannot be within the policy.

This policy is in the common form, and if it were not for the memorandum, I should say that the case was not within the instrument. But, as it now stands, his very clear that those, who were killed by the firing, or died in consequence of their bruises, are within the policy: the other complicated cases must be left

to the jury.

I shall endeavour to discriminate the different classes: and when the general rules for each are fixed, it will be easy for the jury to apply the particular in-

1st. The first class certainly comes within the meaning of the policy, of morulity by mutisy; Such as were killed in the affray.

2d The second also comes under the same description, namely, those who ded of the wounds they received from the firing and other hostilities.

8d. Another class is, I think, as clearly not within the policy; Such, as, being haded in their attempts, in despair chose a mode of death, by fasting, or died through despondency. That is not a mortality by mutiny, but the reverse: for it is by failure of mutiny.

4th. The great class are such as received some hurt by the mutiny, but not mortal, and died afterwards of other causes, as those who swallowed water,

jumped overboard, &c. &c. This is the great point.

VERDICT.

That all the slaves who were killed in the mutiny, or died of their wounds, were to be paid for.

That all those who died of their bruises, which they received in the mutiny, though accompanied with other causes, were to be paid for.

That all who had swallowed salt water, or leaped into the sea, and hung upon the sides of the ship without being otherwise bruised, or died of chagrin, were not to be paid for.

1786. againet EWER.

Part of the demand upon the underwriter arose upon account of seamen's wages, and provisions, which had been ex-ROBERTSON pended in consequence of that detention at Port Mahon, upon the ground that it was part of the damage occasioned by the storm: but, the policy being upon the body of the ship, Lord Mansfield would not suffer the plaintiff to recover for those articles, and they were accordingly struck out of the account.

> It might as well be contended that the damage in that case was insured against as a consequence of the perils of the sea, as that in this case the loss was covered under the clause in the policy, which insures against the barratry of the master.

> Lord MANSFIELD, Ch. J. There is no authority to shew that, on this policy, the insured can recover for such a loss; but it is contrary to the constant practice. On a policy on a ship, sailors' wages or provisions are never allowed in settling the damages. The insurance is on the body of the ship, tackle, and furniture; not on the voyage or crew. this case it is admitted that there was no damage done to the ship, tackle, or furniture; and therefore I think the direction was right, and that the plaintiff ought not to recover.

> WILLES, J. This is not like the case put of a ransom; that was a loss on the ship itself; nor like the other case mentioned at the bar, of a ship which, having been sunk, had been weighed up again; there likewise it was a damage done

to the body of the ship.

BULLER, J. I take it to be perfectly well settled that the insured cannot recover seamen's wages or provisions on a policy on the body of the ship; those are not the subject of the insurance. The case put by the plaintiff's counsel proves the rule. For, if the ship had been detained in consequence of any injury which she had received in a storm, though the underwriter must have made good that damage, yet the insured could not have come upon him for the amount of wages or provisions during the time that she was so repairing. Here the ship itself was safe; and the Court only look to the thing itself which is the subject of insurance; and the wages and provisions are no part of the thing insured.

Rule discharged (a).

<sup>(</sup>a) The case of Eden and Court against Poole, sittings after Hilary 1785, at Guillball, was where a ship put into Ferrol to repair some damage, and when she was going to sail an embargo was laid upon her by the Spanish governor, under which she was detained some time. An action was brought against the underwriters on the ship, amongst other things, for the amount of seamen's wages and provisions during such detention; but Mr. Justice Buller was of opinion, that these charges were not allowable on such a policy.

# TOWERS against BARRETT.

1786.
Tuesday,
Feb. 7th.

A CTION for money had and received, and for money desumperator money bad

On the trial of this cause before Lord Mansfield, at the lies when a sittings at Westminster after last Michaelmas Term, it appears payment ed that this suit was instituted by the plaintiff to recover ten has been guineas, which he had paid to the defendant for a one-horse made on a contract chaise and harness, on condition to be returned in case the which is put plaintiff's wife should not approve of it, paying 3s. 6d. per an end to; as diem for the hire of it. This contract was made by the de-where either fendant's servant, but his master did not object to it at the of the contime. The plaintiff's wife not approving of the chaise, it tract it is was sent back at the expiration of three days, and left on the left in the defendant's premises, without any consent on his part to re-plaintiff's ceive it: the hire of 3s. 6d. per diem was tendered at the rescind it by same time, which the defendant refused, as well as to return any act, and the money.

After a verdict had been given for the plaintiff, Sir Thomas or where the Davenport obtained a rule to shew cause why a nonsuit afterwards should not be entered on the ground that this action, for mo-assents to ney had and received would not lie; but that it should have been on the special contract.

Erskine now shewed cause. This case is very distinguish-continue open, able from those of Power v. Wells (a), and Weston v. Downes the plaintiff (b), on which this rule was obtained. In the former of those can only recess, it was determined that a warranty could not be tried in mages; and maction for money had and received; and in the latter, that the be must such an action did not lie, the payment having been made on state the speach at contract which was still open, and disputed by the defendant, and the But this is the very case put by Mr. Justice Ashhurst (c), breach of it. where he said this action would have lain.

The principle is this; where a man enters into a contract for a sale; and he warrants that the object of that sale shall be of a certain denomination, and he does no act to disallow that contract, there money had and received will lie against him: but where the warranty is disputed, that must be tried in an action on the special contract. In the present case, there was no warranty; it was only a sale on condition, Vol. I.

(a) Comp. 818.

(b) Dougl. 28.

(c) Dougl. 34.

Towns against BARRETT.

which faile?. And it was held in Moses and Macferlan (a) that an action for money had and received will lie to recover money paid by mistake, or upon a consideration which happens to fail.

Sir Thomas Davenport in support of the rule. Wherever there is a special contract, whether conditional or absolute, or in whatever terms it may be conceived, so long as that contract remains open to be disputed, and the party has done nothing to acknowledge the contract, or to preclude himself from entering into the nature of it, the defendant ought to have notice on the declaration that he is sued on that contract.

The cases of *Power* v. Wells, and Weston v. Downes, are decisive as to the present. This comes within the principle laid down by Mr. J. Buller in the latter of those cases, where he said, "where the contract is open, it must be stated specially."

The chaise was left on the premises, but the defendant refused to receive it: then the question is, whether the plaintiff had a right to return it? and how that right is to be tried?—There are several matters here in controversy, which cannot be tried in an action for money had and received; 1st, Whether in fact there were any contract; 2dly, The extent of it; and 3dly, What the plaintiff ought to have paid per diem for the hire; for it is open on this declaration to say that the defendant ought to have had 5s. per diem, as well as 3s. 6d.

When the party has done any thing to preclude himselffrom going into the contract, then money had and received: will lie; but here the defendant disputes it.

will lie: but here the defendant disputes it.

Lord MANSFIELD, Ch. I am a great friend to the action for money had and received it is a very beneficial action, and

founded on principles of eternal justice.

In support of that action, I said in the case of Weston v. Downes, that I would guard against all inconveniences which might arise from it, particularly a surprise on the defendant; as where the demand arises on a special contract, it should be put on the record. But I have gone farther than that; for if the parties come to trial on another ground, thought there happen to be a general count for money had and received. I never suffer the defendant to be surprised by it, unless he has had notice from the plaintiff that he means to rely on that as well as the other ground.

But

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But consistently with that guard, I do not think that the action can be too much encouraged. Here there is no pretence of a surprise on the defendant; there was no other question to be tried. The defendant knew the whole of the BARRETT. matter in dispute as well as the plaintiff. On what ground can it be said that this is not money paid to the plaintiff's use? The defendant has got his chaise again, and, notwithstanding that, he keeps the money.

The case was well put by Mr. J. Ashhurst in Weston v. Downes, and I think this is exactly like that. I was of opi-

nion at the trial that this action would lie; and I still continue of that opinion.

WILLES, J. The only difficulty is to distinguish this case from that of Weston and Downes; and I think it differs from that on two grounds.

That was an absolute, this a conditional, agreement. And another more material difference is, that this agreement

was at an end; the contract was no longer open.

In the case of Weston and Downes, Mr. J. Buller said. "This action will not lie, as the defendant has not precluded "himself from entering into the nature of the contract, by "taking back the last pair of horses." But, in the present case, the defendant has precluded himself by taking back the chaise. I think the verdict is right.

ASHHURST, J. This action is maintainable; for it is different from the cases of Weston v. Downes, and Power v. Wells. The latter was merely a case of warranty. In these actions the party cannot desert the warranty, and resort to the general count, because the warranty itself is one of the

facts to be tried.

As to that of Weston v. Downes; On the first contract there was an agreement to take back the horses, provided they were returned within a month: that would have been like the present case, if they had been returned within that time; but there was an end of the first contract, for the plaintiff took a second, and then a third, pair of horses: that was a new contract, not made on the terms of the first, and that is distinguishable from the present case.

But laying that determination out of the question, this is like the common cases where either party puts an end to a conditional agreement. Here the condition was to return the chaise if not approved of; therefore, the moment it was returned, the contract was at an end, and the defendant held the money against conscience and without consideration.

BULLER,

Towens
against
BARRETT.

BULLER, J. On the very principle in Weston v. Downes, and Power v. Wells, which determined that the action for money had and received would not lie in those cases, it is clear that this action will lie.

It is admitted that if the defendant had actually accepted the chaise, the action would lie: but it has been contended that he did not receive it. Then let us see whether there be not something equivalent to an acceptance? I think there is, from the terms of the contract. There was nothing more to be done by the defendant; for he left it in the power of the plaintiff to put an end to the contract. Here it was not in his option to refuse the chaise when it was offered to him: he was bound to receive it; and therefore it is the same as it he had accepted it,

The distinction between those cases where the contract is open, and where it is not so, is this; if the contract be rescinded, either, as in this case, by the original terms of the contract, where no act remains to be done by the defendant himself, or by a subsequent assent by the defendant, the plaintiff is entitled to recover back his whole money; and then an action for money had and received will lie. But if the contract be open, the plaintiff's demand is not for the whole sum,

but for damages arising out of that contract.

In a late case before me on a warranty of a pair of horses to Dr. Compton that they were five years old, when in fact they turned out to be only four, and they were not returned within a certain time, I held that if the plaintiff would rescind the contract entirely he must do it within a reasonable time, and that as he had not rescinded the contract he could only recover damages; and then the question was, what was the difference of the value of horses of four or five years old?

So that the difference in cases of this kind is this; where the plaintiff is entitled to recover his whole money, he must shew that the contract is at an end: but if it continue open, he can only recover damages, and then he must state the special contract and the breach of it.

Rule discharged (a).

(a) Vid. H. Bl. Rep. C. B. 17.

1786.

#### The KING against The Inhabitants of WHIXLEY.

Wednesday. Feb. 8th.

DY an order of two justices for the West Riding in York- A cattlegate shire, Thomas Potter, Mary his wife, and their four in within the fant children, were removed from the township of Whixley 13 & 14 to the township of Healungh in the county of the city of York, Car. 2. c. 12. On appeal, the quarter sessions discharged that order, sub- for the purject to the opinion of the court of King's Bench on the foling a settlelowing case.

"That Thomas Potter the pauper served an apprenticeship "to kichard Potter in the township of Whixley, the said "Richard then residing there under a certificate from the "township of Bickerton. That, in the two last years of the "pauper's apprenticeship, his master Richard Potter rented "a dwelling house with a garden, orchard, vard, stable, "mistal, and shop, of the value of 11, 11s. 6d. per annum, "and also a meadow containing near seven acres at the "yearly rent of 71. 10s.; and also at the same time, namely, "for two of the last years of the pauper's apprenticeship, "occupied two cattlegates of the value of 11. 4s. a year in a "stinted pasture, on consideration that the said Richard Potter, "being a carpenter, should keep in repair three common high-" way gates, which the persons having a right to the cattle-" gates were bound to sustain."

The question for the opinion of the court was, Whether the said cattlegates were a tenement within the statute 13 &

14 Car. 2. c. 12. ?

Fearnley in support of the order of sessions. These cattlegates are not like commons; they are conveyed by lease and release. The owners of them are tenants in common; they have a joint possession and a several inheritance; the cattlegates are as much demisable as any several tenement whatsoever. There is a material difference between cattlegates and rights of common. Lord Coke (a) enumerates four sorts of common; but a cattlegate does not come within the description of either of them. The owner of a cattlegate has it not in respect of any custom, but as having a joint interest in the soil, which a person having a right of common has not.

If the case of The King v. Minching hampton (b) be cited on the other side, where it was held that the pasture of a piece of land was not a tenement within the statute, it is sufficient

sufficient to say that that was not the point on which that case was determined; for the order was quashed for want of an The Kive adjudication.

against WHIXLEY.

Cockell, contra. The pauper had no right to these cattlegates in respect of any property. It is stated that he occupied two cattlegates on condition of keeping the highway gates in repair, which the persons having a right to the cattlegares were bound to sustain. I his excludes the idea of the pauper's right, and shews that it was only a license to depasture his rattle in consideration of his repairing the gates. In this case the lord, or any of the freeholders, might have distrained the pauper's cattle.

Notwithstanding the case of The King and Minchinghampton was determined for want of an adjudication, yet there is enough to shew that a right of pasture ought not to be consi-

dered as a tenement.

The King v. Lockerly (a) is not to be distinguished from the present case. There the court said, " The land seemed " to have remained to the landlord." So, in this case, " The "land remained to the freeholders;" it was never out of their claim or possession. It was likewise said in that case, "That a tenement must lie in tenure, and must relate to land; "but that that contract related to cows." So here it was a mere personal contract, not relating to land. The case of the parish of Linwood (b) is also in point. These commoners cannot transfer their right to a stranger, because they hold it sub modo. Cro. Fac. 15.

Lord Mansfield, Ch. J. These cattlegates pass by lease and release, and cannot be devised but according to the statute of frauds. They are therefore to be considered as a tene-

ment within the statute.

BULLER, I. said, that the case of The King v. Lockerly was better reported by Burrow than by Bott. In the latter, the case was unintelligible. The court in that decision seem to have gone a great way; for they rejected the words, " Let " and demise" and " Dairy;" and said that the contract related to cows. But the best reason for that decision seems to be that part of it, where they held, that it was not a lease of land or of any thing cut of land; for it was only a right to the milk of the cows.

Order of sessions affirmed.

(a) Burr. S. C. 315. Bott, 349.

(b) Bott. 348,

#### The KING against The Inhabitants of HARBERTON. H

TWO justices, by an order, removed John Eghert from V the parish of Harberton, in the county of Devon, to the sparish of Ashpreington; and that order was quashed on anga appeal to the sessions, subject to the opinion of the court of two king's Bench on the following case.

"That the pauper was bound by the said parish of Harting betton an apprentice to William Soper of that parish until up the should be twenty-four years of age. That he contition must do live with his master until one month of his attendant to take the service, and be taken to take the was absent seven months; and then returned to his father the in Harberton, with whom he stayed a few weeks, and the then offered himself as a servant to Edward Edmonds of the Ashpreington, who refused to take him until he shewed in thim (E. Edmonds) a receipt from his master Soper for in buying off his time, which receipt was in the following ar words;

February 24th, 1783, Received of John Egbert the sum en 'of 41. 4s. Od. for the remainder part of his time, by me al 'William Soper, 41. 4s. Od.' " That such receipt was obtain-"ed by the pauper's father at the request, and with the con-by "currence of the said pauper. That at the time when the re-at "ceipt was signed, and the money paid, Soper the master of-the "fered to give up the pauper's indenture, which the father st "did not take, not thinking it material. That the pauper fa "was not present at the time of applying for the receipt, or "the time of signing it. That the master continued to keep. "the said indenture in his custody uncancelled, and deliver-"ed it up to the pauper, upon the pauper's application for it, "after attaining the age of 24 years. That after the signing. "of the said receipt, and paying the said money, the said pau-"per, being then in the 22d year of his age, hired himself for "a year to serve the said Edward Edmonds, and lived with "him that year, and made another agreement for another. "year, which he also served in the said parish of Ashpreing. "ton. That, at the time of the pauper's hiring himself to the "said E. Edmonds, the pauper shewed the said Edmonds the " said receipt."

This was argued last Michaelmas Term by Morris and Silvester in support of the order of sessions, and Fanshaw, Lawrence, and Clapp against it.

The

The Court took time to consider: 1786.

And now Lord MANSFIELD, (after stating the facts) deli-

The Kine vered the unanimous opinion of the Court.

HA. BER-TON.

As I have often said, it is of more consequence in most cases that the law should be certain, than what the law is. It is particularly so in questions relative to settlements. And perhaps if this court had never gone farther on the present subject than to enquire whether the indentures were in fact cancelled or delivered up, it would have been more convenient than to have decided on the particular circumstances of each case, and to have examined whether they amounted to a relinquishment or cancelling of the indentures or not. But the cases have gone beyond that line; and theretore it might now be attended with more inconvenience to the public to overturn than to adhere to them, even though we may not perhaps approve of the principles on which they have been determined.

Where the facts stated are such, that, upon an action of covenant brought by the master against the apprentice, the pauper could plead the matter in bar, it seems to be settled that the indentures should be considered as cancelled. And to that extent the rule may be carried without much mischief: but if extended to every possible case in which a court of equity would give relief, it would be productive of great inconvenience and uncertainty; it would encrease the litigation of the poor laws, which are already a disgrace to the country; and would leave every case so much on its own circumstances that it must necessarily travel through every stage which the law allows, before the parties can know what they are to expect.

If the justices of the peace at their sessions, or even out of sessions, are to be erected into chancellors, it cannot but happen but that on the same facts very different decisions must Honest and good men, when left to decide secundum discretionem bovi viri, must and will vary in their sentiments. Such a rule therefore would be highly inconvenient, and indeed would amount to say that there was no rule at all:

The question then is, whether the facts, stated here, are such as put an end to the indentures at law, or could be

pleaded in bar to an action of covenant on them?

In that light I shall consider it. The master received four guineas as a satisfaction for the remainder of the apprentice's

prentice's time; he gave a receipt for the money as such; and offered then to deliver up the indentures: if it were not done in fact, it was owing to the pauper's father not thinking THE KING it material; and, on the pauper's attaining the age of 24 years, the master did in fact deliver up the indentures.

After paying the money, if an action had been brought by the master on the indentures, the pauper might have pleaded accord and satisfaction in bar; or if the master had refused to deliver them up on demand, the apprentice might have

brought trover or detinue for them.

The indentures must be considered as not existing from the time when the money was paid; and then the pauper gained a settlement by hiring and service in the parish of Ashpreington.

The consequence is that the order of sessions must be

quashedi

Rule absolutes

# SPIERES against PARKER:

Wednesday. Feb. 8th.

EBT on the statute 19 Geo. 2. c. 30. against the defen- The excep-D dant, as captain of the Diamond ship of war, to recover tions in the hine penalties, of 50% each, for impressing so many of the clause of a mariners out of the ship Minerva, at that time lying off the statute, island of Jamaica, employed in the sugar trade.

The declaration stated that the mariners, impressed by the creates an offence and defendant, had not before deserted from his Majesty's ship gives a pe-

called the Diamond.

After verdict for the plaintiff at Guildhall before Mr. Jus- be negatived by the plaintiff at Guildhall before Mr. Jus- be negatived by the plaintiff at Guildhall before Mr. Jus- be negatived by the plaintiff at Guildhall before Mr. Jus- be negatived tice Buller; a motion was made in arrest of judgment, be-tiff in his cause it was not averred that the mariners had not deserted declaration. from any of his Majesty's ships of war, on the first section of Not so.

the statute, which enacts,

"That no mariner or other person who shall serve on quent pro-"board, or be retained to serve on board, any privateer, or viso. a trading ship or vessel, that shall be employed in any of the Indebt on 19 Geo. 2.

British Sugar Colonies in the West Indies in America, nor c, 30. for any mariner or other person being on shore in the said the penalty " British Sugar Colonies, or any of them, shall be liable to of 50% for " be impressed or taken away, or shall be impressed or taken impressing a mariner in "away, in, or from, any of the said British Sugar Colonies, the West In-" or any of them, or any of the ports thereof, or at sea in dia trade, "those parts, by any officer of officers of or belonging to the declara-" any aver that Vol. I.

nalry, must

by a subse-

descried from any of his Majesty's ships of war. Nothing is to be presumed after verdict but what is expressly stated in the declaration, or what is necessarily implied from those fatu which are atmed.

1786.
Spieres
against
Parker.

"any of his Majesty's ships of war empowered by the Lord "High Admiral of Great Britain, or the Lords Commis"sioners, &c. or any other person whatsoever, unless such "mariner shall have before deserted from such ship of war belonging to his Majesty, &c."

Bearcroft and Gibbs, in support of the rule, contended, That though such ship of war, grammatically speaking, be in the singular number, yet, from the general sense and purport of the act, it cannot be confined to one ship alone, for such necessarily relates to any of his Majesty's ships of war in a former part of the same clause, and means any such ships of war. That therefore this exception, being in the enacting clause, ought to have been specifically negatived by an averment in the declaration.

That this is the true construction of those words appears from another part of the same clause, which prohibits any other person whatsoever, as well as officers of the King's ships, from impressing mariners belonging to merchantmen in the West Indies, unless they have deserted. For if a person (not belonging to any ship) under a commission from the Admiralty, giving him power to impress, took a mariner who had deserted from any of his Majesty's ships, he would be liable to the penalties of this act, if a contrary construction were to prevail; since it is clear that such mariner, so impressed, could not have deserted from such ship, to which the person, acting under that commission, belonged.

That any other person whatsoever, must be construed to mean persons empowered by the Lords of the Admiralty to impress, and not persons (other than the Lords of the Admiralty) giving such a power to the officers. Before the passing of this act, if any mariner had seen a deserter from any of the King's ships on board a merchantman, he might have brought him back: but if the exception extended only to deserters from such ship to which the mariner belonged, he would be subjected to the penalty, and the deserter would be screened.

The intention of the Legislature, in passing this act, was to encourage the trade of the Colonies, but not to countenance descrition. For it was as much the object of the act to prevent merchantmen from receiving deserters from the King's ships, as it was to secure the mariners in the trade from being impressed.

Sir Thomas Davenport and Baldwin contra, insisted, that it was not now necessary to determine whether the circumstance

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PARKER.

stance of these mariners having deserted from any of his Majesty's ships of war would have been a good defence at the trial. For if it were necessary that the plaintiff should have proved that these men were not deserters from any of the King's ships, it must be presumed, after verdict, that such proof was established: and if it were not necessary, then it made no part of the case.

But so far from that being necessary, the declaration need not even have averred that they had not deserted from the Diamond. It would have been sufficient to have stated generally that these mariners were impressed from the merchant ship, which would have put the defendant upon proving that they were deserters. For it is a proviso in the act in favour of the officer, on proof of which he would have

had a verdict at the trial.

If, however, the court should be of opinion that the declaration ought to have negatived particularly the exemptions contained in the enacting clause, and that this, being part of the plaintiff's title, cannot be presumed even after verdict, they then contended, that the averment in the declaration was not deficient in this respect; for that such ship of war can only mean the same ship to which the officer impressing belonged. That it cannot be extended to any of his Majesty's ships; for then it will not be confined to ships in the same port, or even in the West Indies.

The reason of passing the act was, that during a war, the trade of the Sugar Colonies might not be at a stand: but if it were a sufficient ground for impressing a mariner, that he had deserted from any of the King's ships, it would be very easy for an officer at all times to impress whatever number he pleased, under pretence that they had deserted from some ship at a great distance from the West Indies, which could not be determined for several years: but in the mean time the trade would stand still, and the main object of the act be defeated: whereas, if the right of impressing were confined to the officers of the ship alone, from which the mariner had deserted, the evidence would always be on the spot, and it might be determined immediately.

The words "any other persons whatsoever" must mean the power of impressing given by other persons than the Lords of the Admiralty. The King or the Council may delegate the

same powers to any other man, or set of men.

They must relate, therefore, to the power of impressing given by any other person, and not to the power given to any

other

against PARKER.

1786. other person. Or if that were not the true construction of these words, they may be taken to mean any other person on Spieres board that ship who was not an officer.

It is impossible for a man to prove, in the negative, that a mariner did not desert from any of his Majesty's ships of war. It would be throwing a burden upon him repugnant to the spirit of the act, which was a remedial law passed for the benefit of the merchant, and is not like the case of penal statutes. By a subsequent clause, every master of a merchantman is obliged to have a duplicate of a register from the customs of all the men on board his ship, which he is bound to produce to every captain of a King's ship demanding the same. This seems to have been inserted in the act for the purpose of giving information to any captain, from whom any mariner may have deserted; but it can be of no use to the captain of any other ship than that from which such mariner has deserted.

Lord Mansfield, Ch. J. The first point which has been made is a question of form, Whether the exceptions contained in the enacting clause of a statute, which creates an offence, and gives a penalty, must be negatived by the plaintiff in his declaration?-The pleader, who drew this declaration, was clearly of opinion that it was necessary; for he has negatived what he thought to be the exception, and he was right; for it is a settled distinction between a proviso in the description of the offence, and a subsequent exemption from the penalty under certain circumstances. If the former, the plaintiff must, as in actions upon the game laws, aver a case which brings the defendant within the act; therefore he must negative the exceptions in the enacting clause. though he throw the burden of proof upon the other side. Thus it stands on the question of form.

As to the construction of this act; since the argument be. gan, I have changed my opinion upon it. At first, I thought that the declaration had averred all that was necessary; but, upon consideration, I think otherwise. The act itself is very incorrect; for though the expression "such ship" seems at first view to confine the meaning to the singular number, yet it is plain the legislature meant to say, "unless the mariner "impressed should have deserted from such ship or ships." This appears from other parts of the act. The words, "any other person whatsoever," signify persons having a power delegated to them to impress, and not those who delegate such power; and any person so empowered may take a deserter.

As to this being after verdict, it is only necessary to prove at the trial what is alleged in the declaration: and here it was only alleged that these mariners had not deserted from the Spieres Diamond; therefore we cannot presume that in this case it was proved that these men had not deserted from any of his Majesty's ships.

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ASHHURST, J. As to the question of form; the rule is that any man, who will bring an action for a penalty on an act of parliament, must shew himself entitled under the enacting clause: but if there be a subsequent exemption, that is a matter of defence, and the other party must shew it to exempt himself from the penalty.

On the sound construction of the act altogether, I think, that "not having deserted from such ship of war" must mean "from any of his Majesty's ships of war." And the next clause, which directs the masters of merchantmen to make enquiry whether such mariner had deserted from any of his Majesty's ships or ship of war, affords a strong argument for

giving it this construction.

As to the words, " or any other person whatsoever;" they afford a further argument, for they must relate to the person having a power to impress; it is undoubtedly competent to the King to give any officer a power of impressing, though he do not belong to any particular ship. Then it would be absurd to say that he should not be protected, because he is not an officer of the ship from whence the mariner deserted. The meaning of the act is that no person who is a deserter should be protected.

BULLER, J. The rule of form is clear, as laid down by my brother Ashhurst. The instance of the game laws proves it. In every action upon those statutes it is alleged that the defendant was not qualified according to the laws then in being; though it does not negative them specifically, as in the case of a conviction. I do not know any case, for a penalty on a statute, where there is an exception in the enacting clause, that the plaintiff must not show that the party whom

he sues is not within it.

As to its being intended after verdict, nothing is to be presumed but what is expressly stated in the declaration, or what is necessarily implied from those facts which are stated. That is the case where a feofiment is pleaded without livery. A livery is always implied, because it makes a necessary part of a feoffment, I know of no decision against this rule. There is indeed a dictum, in a case which came before Lord Hardwicke

SPIERES against PARKEE.

Hardwicke in this court, (a), which militates against it. That was an action to recover an amerciament in an interior court; and the declaration did not state that the defendant was a resiant. There the Court held that residence must be presumed to have been proved at the trial, otherwise the jury could not have found that there had been any debt at all: but there was a more solid ground for that decision in the subsequent part of the case.

Then as to the construction of the act: till the observation was made at the bar with respect to the words "any other "person whatsoever," I thought "such ship!" was confined to the singular number: but, taking it altogether, it is impossible to make sense of the act without construing "such ship!" to mean "any of his Majesty's ships." For it is manifest from the same clause that other persons, besides officers of the ship from whence the mariner deserts, may impress. A lieutenant of the navy may have authority given him to impress, without belonging to any ship at the time; then it follows of course that this cannot be confined to the officer of such ship.

The construction put on this act by one of the counsel for the plaintiff is, that "any other person whatsoever" must mean others than the Lords of the Admiralty giving a power to impress: but the answer to that is, that this is a construction on a modern act; and notwithstanding any old practice which might have subsisted formerly, we must be governed by the modern usage: and in our times we know of no warrants to impress but such as are issued by the Lords of the Admiralty. Then another construction has been attempted to be put, by saying, that "any other person" is confined to any other person on board that ship: but that would be to reject the word "whatsoever."

(a) Rep. temp. Lord Hardwicke, 116. Wicker v. Norris.

Saturday, Feb. 11th. The KING against The COMMISSIONERS of the Landtax for the Parish of St. MARTIN in the FIELDS, in Westminster.

Mandamus to the commissioners of the land-tax, a in Westminste said commission them in the department for the rates and duties on windows, houses, and lights.

ERSKINE had obtained a rule to shew cause why a mandamus should not issue, directing the commissioners of the land-tax, acting for the parish of St. Martin in the Fields, in Westminster, to proceed to the election of a clerk to the said commissioners, in the department for the rates and duties on windows, houses, and lights.

The

The commissioners of the land-tax are, as such, commissioners for the window and house tax. And by the landtax act (a) the Receiver-general is allowed 2d. in the pound; The Kino the collectors 3d. in the pound; and the 16th section enacts, against The Com-"That the said Receiver-general, upon the receipt of the missioners "whole assessments of the county, &c. shall allow and pay, "according to such warrant as shall be given in that behalf LAND-TAX by the said commissioners or any two or more of them, in ST. MAR-"three halfpence in the pound, and no more, to the commis-" sioners' clerks, for their pains in fair writing the assessments, "duplicates, and copies, herein before directed, and all war-" runts, orders, and instructions relating thereto; and which " said clerks shall be appointed by a majority of the acting com-" missioners present at each respective meeting within every " such hundred, lathe, wapentake, rape, ward, or other di-4 wision."

A dispute having arisen with respect to the validity of an election of a clerk to the said commissioners acting for the pasich of St. Martin in the Fields, in Westminster, on account of the respective claims of two candidates, an action was tried at the last sittings at Westminster to determine which of the two was duly elected, when the election of both was set aside. After this decision, the commissioners, at a meeting which convened for the purpose of putting the land-tax act into encertion, proceeded to an election of a clerk in the departwhere for the rates and duties on houses, windows, and lights; whom one of the former candidates was elected, without noto the friends of the other candidate that the election was to he made on that day, or that even the commissioners were to meet for any other purpose than that of carrying the land. tax act into effect.

The present motion was made under the idea that the election, thus had by surprise, was invalid.

Bearcroft, Mingay, Wood, and Fielding, now shewed cause; and contended.

That there was no instance in which this court had interfered, by granting a mandamus to appoint to such an offee as was the object of the present motion. That the offine ought to be a freehold, or, at least, of considerable permency, to induce the court to interpose in this manner. That this was only an appointment for each particular meet-in of the commissioners, who might appoint some other at their next meeting; so that it was nugatory to with the present motion; for if the mandamus went, and FIELDS.

1786. and the commissioners obeyed the writ, the clerk, thus ans pointed under it, might lose his office, after the first meeting, The King That where the commissioners chose to continue the same against person in the appointment, it was only a matter of convenimissioners ence to them. This, they said, was similar to the office of a clerk to the commissioners under every turnpike act; in the LAND-TAX appointment to which this court had never interfered: and in ST. MAR- that the place of a clerk was not called an office in any of the acts.

> But, 2dly, If the court should be of opinion that a clerk to the commissioners of the land-tax was a proper object for such a writ, in fact the place was not vacant; for the commissioners had actually proceeded to an election.

Lee and Erskine in support of the rule.

The act has directed that a clerk shall be appointed by a majority of the commissioners present, and that he shall receive a certain allowance; by which it appears to be a beneficial office, having fees annexed to it. They insisted that it was no objection to such a writ that the office was not a permanent one, even if the fact were really so. But the clerks under this act receive their allowance by an annual warrant; so that it was at least an annual office. According to the true construction of the act, it could never be contended that the same set of commissioners should at each of their meetings successively appoint a new clerk; for "each respective meet-"ing" relates to the respective meetings of different commissioners acting for different divisions, and not to the different meetings of the same commissioners.

In the case of a dissenting minister, some years ago, this court granted a mandamus, although that could not be consi-

dered as an office.

As to the election which was pretended to have been had, it was sufficient to say that the proceedings of the commissioners, as far as they related to choosing a clerk in the department for the duties on houses, &c. were illegal; for they were then acting only in the characters of commissioners of the land-tax.

Lord Mansfield, Ch. J.

I recollect the case of the dissenting meeting-house. This writ of mandamus is a very beneficial writ; it is grantable where there is no other specific legal remedy. And it is of peculiar use in these cases, where if they have not this remedy, the contest must be productive of endless mischief and inconvenience to the litigating parties.

If there were appointed under this act each time of meeting; there would be no end to the elections: but they receive their allowance under an annual warrant; and their appoint. The Kind ment is at least for a year.

Then as to the election which has been set up, it was taking the other party by surprise; and the election made by the commissioners when acting in another capacity was illegal.

(a) Vid. Comb. 193:

Rule absolute (a).

The Kind against
The Commissioners of the Land-tax in St.

LAND
TAX IN ST

MARTIN

In the

FIELDS.

# The KING against AMERY.

Monday, Feb. 13th.

A N information, in the nature of a quo warranto, having The defendent been filed in last Trinity Term against the defendant, dant having to shew by what authority he exercised the office of an alder pleaded letters patent man of the city of Chester; the defendant, two days before to a quo the end of last Michaelmas Term, pleaded an election under warranto the charter of the 37 Car. 2. and made a profert of the information, and made a profert, concluding, "as, by the said letters patent, amongst made a profert of them other things, appears."

In this term, Topping, for the presecutor, moved for over over was of the letters patent, insisting, that the prosecutor was, by refused in law, entitled to oyer, so as to put the whole charter upon the term from record, if he pleased (a). That it might be material for the that in prosecutor to set forth other parts of the charter, which which the could not be done unless upon oyer. 1 Stru. 227. That the profest was defendant, in the present case, derived title under the letters patent, and therefore was bound to shew them. Sty. 15: That the letters patent were not alleged in the plea to be enrolled, and therefore a profert was essentially necessary. That in 1 Lord Ray. 299, it is laid down, that if letters patent be enrolled in the same court where pleaded, it was not necessary to shew them; but if in another court, then they must be pleaded with a profert. That the defendant having actually pleaded with a profert, the prosecutor was entitled to over, and the not granting it was error (b). That whereever a charter is pleaded against the crown, a profert was netessary: Doctr. Plac. 215. It was so in a quo warranto.

1 Sid. 311.

BULLER, J. Oyer cannot be demanded in another term

than that in which the plea was filed.

Topping said, in Lane's Rep. 39. it was held that over might be granted in the King's Bench, though not in the Common Vol. I.

You. I.

(8) Việte Salk. 498. 6 Mod. 28.

against AMBRY.

Pleas. And in 1 Mod. 69. Twisden, J. said, "If it be in "bar, you cannot demand over of the letters patent in the The Ki Q " next term; but in a replication you may, because you " mention the precedent term in the bar, and not in the re-" plication."

> On shewing cause, it was insisted by Sir Thomas Davenport and Cowper, 1st, That no one was entitled to over of a

record, 5 Co. 74. Wymark's case, and 1 Saund. 8.

2dly, That there cannot be over in another term from that in which the profert is made. 5 Co. 74. b. 76. b. 3 Salk. 119.

Wilson, Wood, and Topping, for the prosecutor, in addition to the former cases, cited 10 Co. 95. Dyer, 29. b. Moor, 849. 1 Wils. 16. 4 Burr. 2143. It was also contended that if over be craved before the rule to plead is out, that is within proper time (a). And here the time to reply was not out when the ouer was demanded.

The court discharged the rule with costs; and

BULLER, J. observed that on either ground this application was ill founded. I here was great doubt formerly when ther over should be granted of letters patent, as appears from the case in Lord Raymond: but now for 20 years past there has been no instance of a profert having been made of letters patent in a plea to a quo warranto information; and if there were a doubt at that time, 20 years practice is a strong argument to shew what the law is.

If there be no letters patent inrolled in Chancery, that might be a ground to come to this court to apply for a copy of them; but that must be done by affidavit.

In the court of Common Pleas (b) oyer was craved of an original writ, which was refused. This is matter of record, and you have no right to have oyer of a record.

On the second point, the case in 1 Mod. 69, is a direct

authority against the prosecutor.

(a) Vide Barnes 242. (b) Barnes 4to edit. 340. So likewise determined in B. R. Vide Dougl. 215.

END OF HILARY TERM.

# CASES

#### ARGUED AND DETERMINED

IN THE

# COURT OF KING'S BENCH,

IN

## EASTER TERM,

IN THE TWENTY-SIXTH YEAR OF THE REIGN OF GEORGE III.

TREVOR against WALL.

1786. May 5th.

jurisdiction,

as well as

RROR on a judgment in an inferior court in Shropshire. In an infe-The first count in the declaration, which was for money rior court had and received, alleged that the defendant below was in the declaradebted to the plaintiff in a certain sum, which he promised to allege that pay within the jurisdiction; but it did not state that the money the money was had and received within the jurisdiction. was bed and

There was another count on an account stated, which alleged that the account was stated within the jurisdiction.

Chambre for the plaintiff in error.

In actions in inferior courts, it is necessary that the gist of that the de-The mised to pay the action should appear to be within their jurisdiction. having and receiving of the money is the consideration of the within it, promise in the present case; the declaration would have A court of been bad, if that had been omitted: and, being the most award a vematerial part, it ought to have alleged that the money was nire de novo had and received within the jurisdiction.

He cited several authorities in support of this objection, proceedings In Stanian v. Davis, 6 Mod. 223. and Salk. 404, it was held, an inferior that every part of that which is the gist of the action in an court: and inferior court should appear to be within its jurisdiction.

therefore if The count in the any one declaration

when the

be bad, and the judgment be general, it must be reversed in toto.

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THEVOR against WALL.

The case of *Peacock* against *Bell* and another (a), he said, was directly in point. That was a writ of error on a judg; ment in the county palatine of *Durkam*, in which court the plaintiffs declared that the defendant was indebted to them in the city of *Durham* in 39l. for goods and merchandizes by the plaintiffs, before that time, sold and delivered to the defendant, and being so indebted he promised to pay, &c., After verdict for the plaintiff, error was brought, and exception was taken to the declaration, that it did not state that the goods were sold and delivered within the jurisdiction. There it was agreed, that this was a good exception to a declaration in an inferior court; but that declaration was determined to be good, because the court of the county palatine was an original superior court.

He mentioned another case of Waldock v. Cooper (b), in which it was determined on a writ of false judgment, brought upon a judgment in the borough court of Aylesbury, that the declaration must allege that the goods were sold and delivered within the jurisdiction, as well as that the defendant promised within it; and the words of the court there are very strong, "if there were no precedents to the contrary, we "should be desirous to help this judgment after a verdict; but we cannot do it against so many precedents (c)."

Wood, contra, observed, that this was after verdict; and every thing necessary to support it must now be presumed to have been proved at the trial. Unless the plaintiff below proved that the money was had and received within the inferior jurisdiction, he could not have recovered. Most of the cases cited on the other side were of ancient date: he hoped this would receive a more liberal determination; especially as this was one of those cases which are aided by the statutes of jeofails.

But this objection, (even supposing it to be well-founded) goes only to one count. The other, which is on an account stated, is indisputably good. The declaration alleges the account to have been stated within the inferior jurisdiction; and it has been determined that it is not necessary to state that the items of an account stated arose within such jurisdiction (d). The judgment must be affirmed as to that count which is good, and then there should be a writ of enquiry

<sup>(</sup>a) 1 Saynd. 73. (d) 2 Stra. 827.

<sup>(</sup>b) 2 Wile. 16.

<sup>(</sup>c) V. also 2 Ld. Raym. 1310.

1786.

TREVOR against

to assess the damages on it; for it is impossible for this court

to ascertain what damages were given on each count.

He then cited Grant and Astle (a) to shew that a court of error may award a venire de novo. Here he hoped the court would grant such a writ to assess the damages, as also the costs which the plaintiff below is entitled to, if one count be good.

A venire de novo has also been awarded by the House of

Lords on a writ of error (b). But

Per Curiam, There is no instance of a court of error granting a venire de nove, when the proceedings originated in an inferior court (c). We cannot now say on which of the counts damages were given (d). None of the statutes of jeofails assist the present case. The first count is defective in substance, for the consideration of the promise, which is the money had and received, is not alleged to be within the jurisdiction.

Judgment reversed (e).

(c) Dougl. 696. (b) Vide 2 Str. 1053. 4 Brown, Ap. 280. post. (c) Vid. 1 Str. 499. & 1 Burr. 572. (d) Vide Hancock v. Hayward, post. 3vol. 435. (e) The same point was determed in Oram v. Embrey, without argument, on the authority of this case. Tr. 29 Geo. 3. B. R.

#### FITZROY against GWILLIM.

Fridey, May 5th.

TROVER for goods, tried before Lord Mansfield, Ch. J. Before a party can entitle at the sittings after last Hilary Term at Westminster.

The plaintiff had pawned goods of the value of about 90% civil action to the defendant who was a broker, for which he advanced to relief from her 25% and was to receive nine guineas for the interest theremust tender an usurious of for half a year: in order to secure which a written agreemust tender ment was entered into, the purport of which was that, upon all the mopayment of 34%. 9s. and interest thereon, the plaintiff was to ney really have the goods returned; (except in case of loss or accident advanced, by fire.)

It appeared in evidence that a fire had happened, by which the greater part of the goods had been consumed. A demand of the remaining part was afterwards made, by the plaintiff, and 41. offered for warehouse room, which being refused she

brought this action.

Lord MANSFIELD being of opinion, at the trial, that the parties were in pari delicto, and that the rule potior est condition possidentia ought to prevail, nonsuited the plaintiff.

Luders

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FITEROY
against
GWILLIM.

Luders moved to set aside this nonsuit, and to have a new trial, upon the ground that the plaintiff was not participal criminis, but that the usury was wholly on the part of the defendant, and therefore the rule did not apply. Cowp. 200 & 792. The plaintiff, in order to recover, had only to show a citle in herself, a possession in the defendant, and a tender for the warehouse room. The defence set up to this was an usuarious contract, which, if it were allowed, would entirely defeat all the statutes against usury.

That from a consideration of the case of Astley v. Reynolds (a), it appeared that trover was the proper remedy in this

Casc.

Lord Mansfield, Ch. J.

This is an equitable action brought by the plaintiff in order to be relieved from an usurious contract. She must estate therefore with clean hands, according to the principle laid down in the case of Bosanquet and Dashwood (b), that those who seek equity must do equity. It was there determined that a court of equity would afford relief in such cases upon payment of principal and interest. A lender upon an usurious contract is precluded from recovering any thing upon such contract; but if the borrower seek relief, he must first do what is right as between the parties. Here the plaintiff did not tender what had been actually advanced, and cannot therefore have the benefit of this equitable action.

BULLER, J.—It is the plaintiff who discloses and relies on the usurious contract in this case, in order to take advantage of it. The borrower brings the action. It is enough for the defendant to say that the goods were pawned by the plaintiff. Then the plaintiff in answer is obliged to shew an agreement, by which she is entitled to have these goods returned to her on payment of certain interest, which is usurious on the face of it, and which she is desirous of setting saide; but she has done nothing to entitle herself to the relief she claims.

This case is distinguishable from the case of Astley and Reynolds: there the action was brought not to avoid the contract, and recover the whole sum paid, but only the surplus

above the legal interest.

Per Cur. Rule refused.

(a\ 2 Stra. 915. & Bull. N. P. 132. 38. et vid. Vin. Abr. tit. Usury, p. 315.

(b) Cas. in Eq. temp. Lel. Talbar

THOMPSON and Others, Assignces of JANE WISE. MAN, against FREEMAN.

HIS was an action of trover tried before Buller, Justice, May 5th. at the Sittings after last Hilary Term, at Guildhall, and give a prefewas brought by the assignees of the bankrupt in order to re-rence to a cover some goods which the defendant had taken possession creditor unof under a warrant of attorney to confess a judgment executed der the apprehension by the bankrupt about six months before the act of bankrupt- of legal procy committed, but at a time when she knew she was in an in-cess, howevsolvent state.

The defendant had in the year 1780 joined in two bonds preserence is with the bankrupt, and had received a counter-bond of indem-binding. nity. When these bonds became due, the bankrupt, not hav- Where the ing wherewithal to discharge them, applied again to the de-detendant, upon joining fendant, and engaged him to join with her in two new bonds, with the payable in July 1784, for the purpose of raising money to bankrupt as take up one of the old bonds: one of them was accordingly surety in two taken up the 14th Jan. 1784.

The defendant took another counter-bond of indemnity bond of in-

upon his joining in the two last bonds.

Previous to the 3d of June 1785, the day on which the previous to her bank. act of bankruptcy happened, the bankrupt sent for the de-rupicy, befendant, and proposed to him that he should take out his fore the two debts in goods, to which he acceded, and the warrant of at-bonds bedebts in goods, to which he acceded, and the warrante or an came due, torney in question was given. It appeared that her reason received a for sending for the defendant originated from a letter, taking warrant of notice, though not in a threatening way, of her situation with attorney to respect to the defendant, which letter she had received just confess judgment from before from Messrs. Fosset and Bellamy, whom she knew to the bankhave acted in a former transaction as attornies for the defen-rupt, and dant, though upon this occasion they were not in fact con-took possescerned for him.

The two last bonds were not discharged by the defendant that he was till some time after the execution, nor had the obligees ever entitled to threatened to resort to him for payment at that time, the retain them bonds not having then become due.

Another circumstance was also much relied upon for the tho' the two plaintiffs at the trial, that the defendant upon his examination bonds were before the commissioners had sworn, that when he took pos- ed by him session of the goods, under the warrant of attorney, he was till after the not an actual creditor.

The judge left it to the jury to consider whether the nor had the means which the bankrupt put into the defendant's hands to threatened pay himself were fraudulent or not; for if she had executed to resort to the warrant of attorney from necessity, or in order to save him for pay herself, though perhaps acting by mistake, or under a false ment. apprehension

Friday,

ed a counter demnity, and

sion of goods under it, held

assignees,

apprehension that the defendant was taking due means to en force his demands upon her, it was certainly a legal act; but THOMPSON if she had acted merely with a view to favour the defendant. RREMAN. and give him an unjust preference, it was void.

The jury found a verdict for the defendant; and now.

Erskine moved for a new trial, on two grounds:

1st. That the defendant at the time of executing the warrant of attorney was no creditor of the bankrupt. ditor threaten process, and in consequence of such threat the debt is paid, and the debtor afterwards become a bankrupt, the preference given under those apprehensions is valid and binding; but not so, if the person threatening was no creditor

at the time, though he afterwards became so.

The question then is, how far the defendant was a creditor? He was then only bound as a surety with the bankrupt, and his debt could not arise till he had actually discharged the bonds. But at that time he was not even threatened to be called upon: that would have been a middle case, and though still there would have been no existing debt, yet it might perhaps have become a question, whether or not it would have been such an equitable claim as this court would support (a).

2cly, Allowing the defendant to have been a creditor, yet this case is not distinguishable from the general rule, which avoids every preference by the bankrupt, unless obtained by the due diligence of the creditor. Here the defendant made no application to the bankrupt, nor did any act to entitle himself to this preference: therefore, as between these parties, her sending for him was a mere voluntary act, which brings this case within the rule laid down in Harman v. Fisher (b); that however meritorious the preference may be, if it were not given in consequence of the creditor's threatening the bankrupt with legal process, it is void (c).

Lord

(a) Vide Toussaint v. Martinant, post 2 vol. 100. (b) Cowp. 117. (c) In Couver and Others assignees of White v. Gough, M. 30 Geo. 3. B. R. which was trover for a bill of exchange drawn by White the bankrupt, on one Seper, and accepted by him; where it appeared that the defendant a creditor, had called on White three days before his bankruptcy, and demanded payment of his debt, and received from him this bill; the Court held [upon a motion for a new trial, which was granted] that the defendant had a right to retain the bill, though he had not actually threatened any legal process. And afterwards on the 2d trial, Lord Kenyon said that in considering whether such payment were in order to give an undue preference, and in contemplation of bankruptcy, it was not sufficient to shew [which was the only evidence produced by the plaintiffs in this case] that the bankrupt must have known that insolvency was inevitable, but the quo enimo of both must be considered; though if a bankrupt officiously made such payment to a creditor on the eve of his bankruptcy, that of itself would be evidence of fraud: it would not be a payment in the ordinary course of trade. On the other hand it was not necessary to the validity of such payment, that the creditor should actually threaten an arrest; but there might be a middle case between the two, like the present, where the creditor called on his debros and demanded payment, which the latter submitted to. Digitized by Google

1786.

is not enti-

Lord Mansfield, Ch. J.

A bankrupt when in contemplation of his bankruptcy canmot by his voluntary act favour any one creditor; but if un- Thompson der fear of legal process he give a preference, it is evidence that he does not do it voluntarily. And though the defendant in this case had taken no steps to secure himself in case he was called upon, vet the bankrupt acting from mistake was under the same apprehensions of legal process, as if the defendant had actually threatened her; so that her executing the warrant of attorney was not a voluntary act, but the effect of fear, however groundless that might be.

Rule refused.

THOMPSON and Another, Assignces of NELSON a Theoday, Bankrupt, against COUNCELL.

HIS was an action of trover for several articles of plate A bankrupt,

by the assignees of a bankrupt.

tled to any The cause came on to be tried at the Sittings after last maintenance Hilary Term, at Guildhall, before Lord Mansfield, when the one of his Fury found a verdict for the plaintiffs, damages 20% and costs effects dur-40s. subject to the opinion of the court on the following mination.

Case—That on the ninth day of July 1785 the bankrupt

committed a secret act of bankruptcy.

That on the 27th of July the bankrupt was surrendered in discharge of bail to the custody of the marshal of the King's Bench.

That on the 2d of August a commission of bankrupt was

issued against him.

That on the 5th and 6th of the same month of August, the bankrupt, having a family of six children, applied to the desendant, who was his sister-in-law, to take out of his house so much plate as would raise 20% for the maintenance of himself and family.

That she borrowed 201. upon the plate, for the support of the bankrupt and his family, all of which she expended in the maintenance of the bankrupt and his family for the space of 55 days, besides advancing 14/. more of her own money

for that purpose.

That the defendant knew of the commission of bankrupt having issued when the plate was taken from the bankrupt's

bouse.

The question for the opinion of the court is, whether the plaintiffs are entitled to recover in this action? If the court shall be of opinion that the plaintiffs are entitled to recover Vol. I.

1786. in this action, then the verdict to stand. But if the court shall be of opinion that the plaintiffs are not entitled to reco-

against Councell.

Worrall, for the plaintiff, made two questions;

1st, Whether, under any of the statutes relating to bankrupts, the bankrupt is entitled to receive any maintenance from his effects during his examination?

2dly, Whether, supposing he has a right to any such maintenance, any other persons than the assignees can allow it?

As to the 'first, no maintenance is allowed by any of the statutes. The only two instances where any allowance is made are, either where the bankrupt conforms to the bankrupt laws, and pays ten shillings in the pound; in which case he is entitled to 5 per cent. under the 5 Geo. 2. c. 30. s. 7. and so proportionably to a larger sum according to the dividend which his creditors receive; or, 2dly, where the bankrupt is entitled by the same statute (a) to receive 2s. 6d. per day, while settling his accounts, after obtaining his certificate.

That the Legislature did not intend to allow a bankrupt any maintenance is very clear from a review of the 9th section of the same act, where there is an exception as to his tools of trade and wearing apparel, &c. but no mention is made of any maintenance; so that if the Legislature had intended to make any further exception in favour of bankrupts, they would have inserted it in that section of the sta-

tute.

There could be no doubt but that the property was vested in the assignees from the time of the bankruptcy. And trover is the proper action. Comper and Chitty. 1 Burr. 20,

1 Blackst. Rep. 65.

2dly, Even admitting that any allowance ought to be made to a bankrupt out of his effects during his examination, the assignees alone are the proper judges of that allowance. They have the distribution of his effects. In this case the commission issued on the 2d of August, and the goods were not taken till the 6th of August, when the messenger was in possession under the commission.

Mingay, contra, did not dispute that the bankrupt's effects were vested in the assignees by relation from the time of the act of bankruptcy, but said the only question here was, whether this case under all its circumstances did not make a necessary exception. It has been usual in these cases, when

(a) s. 36.

COUNCELL.

there has been no fraud, and the demand has not been unreasonable, not to enquire too strictly whether the bankrupt and his family have been maintained out of his effects from Tuckpson the time of the bankruptcy till the last examination. It has never yet been determined that no allowance ought to be made to him; and it has been the constant usage to maintain him during that time. And it can make no difference whether the support is to come through the hands of the assignees, or to be taken by the bankrupt himself, when it is even not suggested that such maintenance is unreasonable. In this case, the smallness of the sum taken excludes any idea of fraud; especially as the sister advanced 14% of her own in addition to the bankrupt's 20%.

Lord MANSFIELD, Ch. J.

This is a very cruel case; but if the assignees insist upon

their claim, this court cannot assist the defendant.

BULLER, J .- Supposing the bankrupt ought to be main. tained out of his effects during his examination (a), yet this defendant cannot be justified in taking the property of A. to maintain B.

The Postea to be delivered to the plaintiffs.

(a) See the exception in the bankrupt's last examination, of what has been laid out in the ordinary expence of himself and of his family, in 5 Geo. 2. c. 30. 4. 1.

RIGHT on the Demise of FLOWER against DARBY Tuesday, and BRISTOW.

FIGURENT tried at the last Assizes at Salisbury, be-in the case fore Hotham, Baron, when a verdict was found for the from year to plaintiff, subject to the opinion of the court of King's Bench year, there

on the following case:

must be half That the lessor of the plaintiff was seised in fee of the a year's no-premises in question. That on the 11th day of May 1781, ending at the defendant Darby took the premises, which are a house in the expira-Salisbury, and occupied them as a public-house from that tion of the time under a parol demise at 10l. per annum; the rent to year. commence from Midsummer then next following. fendant Darby let part of the premises to the defendant That on the 26th March 1785, the defendant Darby was served with a notice to quit on the 29th of Seps tember following:

The

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RIGHT against DARBY.

The question is, Whether the lessor of the plaintiff is entitled to recover?

Le Mesurier for the plaintiff.

The question for the Court to decide is, whether the rule which requires that half a year's notice should be given to a tenant at will, before an ejectment can be brought, requires also that such notice should expire at the end of the year. Neither the case of Parker dem. Walker against Constable (a), and the cases there cited, nor any subsequent case, require the notice to expire at the end of the year; but it is sufficient if notice be given for the space of half a year, without reference to any particular period of the term.

In the case of *Throgmorton dem. Wandby* v. Whelpdale (b), it is said that half a year's notice to quit to a tenant at will is as old as *Henry* the Eighth's time (c); but no mention is there made as to the time when the notice is to be given.

But if the rule is to prevail in any instance, still there is a great difference between land and houses. The same reasons which may induce the court to extend it to the former are not applicable to the latter. With respect to lands, there might be a hardship in suffering the landlord to oust the tenant in the middle of the year, by which he would be put to the inconvenience and expence of carrying the crops from off the premises. But no such reason could arise in the latter case from the nature of the thing itself. On the contrary more inconvenience would ensue both to landlords and tenants from adopting the strict rule attempted to be imposed, than by adhering to that which seems originally to have prevailed, namely, of giving half a year's notice to quit, without reference to any particular period of the term.

If it be objected that the rent is not here stated to have been reserved quarterly, the inconvenience, if any must fall upon the landlord, who will thereby be deprived of his rent for one quarter; as the landlord who determines a tenancy at

will does it at his peril (d).

Gibbs

<sup>(</sup>a) 3 Wils. 25. (b) Hil. 9 G. 3. Bull. N. P. 96. (c) 13 H. 8. 15. b. (d) Vid, Hargrave's Co. Litt. 56 b. note 16. and the cases there cited. "If "there is tenant at will rendering rent at Michaelmas, and lessor determines the will before Michaelmas, he shall not have any rent; but it has been holden that if lessee at any day before the rent day determines his will, yet lessor shall." have the rent incurring the next day after such determination of the will.

Gibbs for the defendant. What was formerly a tenancy at will is now a tenancy from year to year; and a tenant from year to year must ex vi termini hold for a whole year. In this case the year ended at Midsummer, therefore the half year's notice ought to have been to quit at that time.

RIGHT against DARBY.

He then cited a case of Sykes on the several demises of Murgatroyd & Wilkes v. \_\_\_\_, before Blackstone, Justice, at York Summer Assizes, 1774, where John Murgatroyd, being seised for life, remainder to his wife for life, with remainders over, in 1772 agreed with the defendants to grant them a lease for fourteen years to commence from the 13th February, 1772, at 141. per ann. The defendants entered under that agreement, but no lease was granted. J. Murga. troyd died in July 1773. At the latter end of the same month his widow gave the defendants a notice to quit on the 2d of February next, and some time after made a lease to the lessor of the plaintiff Wilkes, to commence on the 2d February. Subsequent to this she accepted half a year's rent from the defendants which was due at Martinmas 1773. Blackstone, J. seemed to think, that if no notice to quit had been given, the acceptance of rent would have been sufficient evidence of an agreement between her and the defendants, that they should continue from year to year; and therefore a notice subsequent to that acceptance of rent must have been a half year's notice to quit on the 13th February, but the acceptance of rent was only evidence of such agreement, and rebutted by the notice; and so the plaintiff had a verdict.

In another case before Lord Mansfield, at Guildhall, in which Mr. Duncomb brought an ejectment against a tenant, but could not prove from what time the term commenced; the tenant proving it to be different from the time to quit

mentioned in the notice, the plaintiff was nonsuited.

And in a later case of *Doe dem. Puddicombe* v. *Harris*, at *Dorchester* Summer Assizes, 1784, before *Eyre*, Baron, the demise was laid on the 30th *March*, 1784. The plaintiff proved a receipt of rent from the defendant, and that he gave him six months notice to quit at *Lady-day*, 1784. Among other objections against the plaintiff's recovering, the following was taken; that supposing the defendant was tenant from year to year, it was not proved that he was tenant from *Lady-day* to *Lady-day*, and so no tenancy was proved upon which a notice to quit could operate. But *Eyre*, Baron, in answer to this objection, said that as the defendant

RIGHT against

had six months notice to quit at Lady-day, he should presume that he was tenant from Lady-day to Lady-day, unless the contrary were shewn, and therefore the notice was sufficient.

All these cases prove clearly the point contended for (a).

Le Mesurier replied, that all the cases cited related to land alone and not to houses, and fell within the distinction before taken; the reasoning from them therefore does not apply. This species of holding is still in strictness, a tenancy at will, though by construction it is considered in the case of land, for the sake of convenience, as a tenancy from year to year. There is no necessity for extending that construction to such cases as the present.

Lord MANSFIELD, Ch. J.

When a lease is determinable on a certain event, or at a particular period, no notice to quit is necessary, because both parties are equally apprized of the determination of the

term (b).

If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was to hold for a year. But then it is necessary for the sake of convenience, that, if either party should be inclined to change his mind, he should give the other half a year's notice before the expiration of the next or any following year: now this is a notice to quit in the middle of the year, and therefore not binding, as it is contrary to the agreement.

As to the case of lodgings, that depends on a particular contract, and is an exception to the general rule. The agreement between the parties may be for a month or less time, and there to be sure much shorter notice would be sufficient, where the tenant has held over the time agreed upon, than in the other case. The whole question depends upon the nature

of the first contract.

ASHHURST, J.—There is no distinction in reason between houses and lands, as to the time of giving notice to quit. It is necessary that both should be governed by one rule. There may be cases, where the same hardship would be felt in determining that the rule did not extend to houses as well as lands; as in the case of a lodging-house in London, being let to a tenant at Lady-day to hold as in the present case: if the landlord should give notice to quit at Michaelmas, he would by

(a) Vide Roe d. Jordan v. Ward, H. Bl. Rep. C. B. 97. (b) Ante, 54.

by that means deprive the lessee of the most beneficial part of the term, since it is notorious that the winter is by far the most profitable season of the year for those who let lodgings.

1786. RIGAT against DARBY.

BULLER, J .- It is taken for granted by the counsel for the plaintiff, that the rule of law, which construes what was formerly a tenancy at will of lands into a tenancy from year to year, does not apply to the case of houses, but there is no ground for that distinction. The reason of it is, that the agreement is a letting for a year at an annual rent; then if the parties consent to go on after that time, it is a letting from year to year. This reason extends equally to the present case: an annual rent is here reserved; and upon such a holding it has been determined that half a year's notice to ouit is necessary. This doctrine was laid down as early as in the reign of Henry the Eighth (a). The moment the year began, the defendant had a right to hold to the end of that year; therefore there should have been half a year's notice to quit before the end of the term. This gives rise to another objection in this case, upon the distinction between six months and half a year. The case in the Year-books requires half a year's notice; but here there is less than half a year's notice, and therefore it is bad on that ground also.

(b) Judgment for the defendant.

(a) 18 H. 8. 15, b.

(b) V. 2 Salk. 413.

CARTER against PEARCE, Administratrix &c. of BIGGS.

Tuesday. May 9th.

DECLARATION for work and labour, and for money A co-obligor paid, laid out, and expended.

in a bond to

Pleas the general issue, except as to 21. 5s. and as to that a the Ordinary tender by the defendant; on both which, issues were joined. 23 Car. 2 c.

ness to prove

This cause was tried at the last assizes at Salisbury before 10. is a com-Hotham, Baron, when a verdict was found for the defendant, Petent witsubject to the opinion of the court, on a

Case—which stated, that the sum of 21. 5s. was tendered to the administhe plaintiff by one Wood, who was one of the defendant's se-tratrix. curities by bond in the ecclesiastical court for her duly administering the intestate's effects.

The

1786.

CARTER

against

PEARCE.

The question for the opinion of the court is, Whether the said Wood was a competent witness for the detendant.

Jekyll for the plaintiff. Gibbs for the defendant.

The Court said no question could be entertained about the competency of Wood's testimony; and that if a creditor of the administratrix had been offered as a witness, (which was a stronger case,) there could have been no objection to his evidence being received. The bare possibility of an action being brought against a witness is no objection to his competency. And

BULLER, J. added, that this was not like the case of bail, because they are directly and immediately interested; for if a verdict be given against the principal, the bail become im-

mediately answerable.

In order to shew a witness interested, it is necessary to prove that he must derive a certain benefit from the determination of the cause one way or the other (a). Then in this case, supposing there were no assets, though the defendant would be answerable for the costs, she would not be liable on her bond to the ecclesiastical court. She is only bound to distribute the intestate's effects, and it does not appear in this case how she has applied them.

Judgment for the defendant.

(a) Vide post. Bent v. Baker, 3 vol. 27.

Wednesday, May 10th. The KING against The Inhabitants of BUCKLEBURY.

An order of WO justices removed the paupers from Bucklebury to justices removing Bradfield by the following order:

"Berks, to wit. To the churchwardens and overseers of

derivative the churchwardens and overseers of the poor of the parish of Rucklebury in the said county and derivative to the churchwardens and overseers of the poor of the parish settlement, of Bradfield in the said county, and to each and every of without tak-

"Upon the complaint of the churchwardens and oversettlement of seers of the poor of the parish of Bucklebury in the said
their parents, is
good. And and seals affixed, being two of his majesty's justices of the
the evidence péace in and for the said county of Berks, and one of us
of the father of the quorum, that Elizabeth Knott about five years of age,
to prove

their settlement may be dispensed with, where his attendance cannot be procured.

against

" John Knott, about two years and a half old, and Sarah " Knott about one year and a half old, have lately come to in-"habit in the said parish of Bucklebury, not having gained a The Kino "legal settlement there, nor produced any certificate, own-"ing them to be settled elsewhere; and that the said Eliza-" beth Knott, John Knott, and Sarah Knott are likely to be "chargeable to the said parish of Bucklebury; we the said "justices, upon due proof made thereof, as well upon the " examination of Elizabeth Knott their grandmother upon outh, "as otherwise, and likewise upon due consideration had of "the premises, do adjudge the same to be true. And we " do likewise adjudge that the lawful settlement of them the " said Elizabeth Knott, John Knott, and Sarah Knott, is in " the said parish of Bradfield, in the said county of Berks." The order then proceeded in the usual form.

The sessions on the appeal quashed the order of removal

upon the merits, and stated the following case:

The paternal grandfather of the three paupers, mentioned in the order of removal hereunto annexed, was at the time of his death a parishioner of, and settled in, the parish of Bradfield. He left several children by his wife Elizabeth Knott, and amongst others, Charles Knott, who went to the parish of Twickenham in the year 1777, where he married Sarah Slade, who dying about Christmas 1784, Charles Knott brought the three paupers named in the order to Elizabeth Knott his mother, who was living in the parish of Bucklebury 1785, and told her (a) that they were his day of children; and desired she would take care of them, and told her he would send the money from time to time to pay for their maintenance. The paupers remained with Elizabeth Knott about fourteen weeks; at the end of which time Charles Knott her son not having sent money sufficient for their maintenance, and Elizabeth Knott, who had herself received parish relief, being unable to maintain them, they were removed by the annexed order of removal to the parish of Bradfield.

The parish of Bradfield appealed at the Midsummer Sessions 1785, being the next general quarter sessions of the peace after the removal; but Charles Knott, who had left the paupers in the manner before mentioned with Elizabeth' Knott his mother, though he had been served with a subpana to give evidence by the parish of Bucklebury after notice of appeal served upon them by the parish of Bradfield, Vol. I. not .

(a) Vid. R. v. The Inhabitants of Eriswell, post. 3 vol. 707.

1786. not appearing to give evidence, the appeal was lodged, and adjourned to the Michaelmas sessions; and it was recom-The King mended by the justices that the appellants and respondents Buckle. Should endeavour at their joint expence to find the said BURY. Charles Knott, and have him at the next sessions to give evi-

> The said Charles Knott not appearing at the Michaelmas sessions to give evidence, the appeal was not then heard, but

was adjourned to the next Epiphany sessions.

At the Epiphany sessions 1786 the appeal came on to be heard; when the respondents proceeded (according to the practice of the sessions) to support the order of removal by the following evidence:

They proved the paternal grandfather David Knott had his settlement at the time of his death in the parish of Bradfield, and that the said Charles Knott his son was born in the

parish of Bradfield.

They produced the register of the marriage of Charles Knott with Surah Slade, and also of the haptisms of Elizabeth daughter of Charles and Sarah Knott, dated 15th May 1780, of John son of Charles and Sarah Knott, dated 16th December 1781, and of Surah daughter of Charles and Sarah Knott, dated 21st December 1783.

Charles Knott not being present to give evidence, it did not appear whether he had acquired any settlement or not subsequent to his derivative settlement. Charles Knott was not produced at all, and no evidence was given to identify the persons named in the order, and delivered to Elizabeth Knott by Charles Knott, as the legitimate children of the said

Charles and Surah Knott, except as aforesaid.

Wilson, in support of the order of sessions, and against the original order, contended, that the order of the justices was informal on the face of it. It appears that the paupers were nurse children; and as such, they ought not to have been removed without their father and mother, unless the order had stated that the parents were dead. Otherwise the children might be settled in a different parish from their parents, because the father may have gained a subsequent set. tlement, which he could not communicate to them if this order had been unappealed from. It should have stated that Bradfield was the last legal settlement of the father, and by consequence the settlement of the children. Besides, there could be no evidence to prove that they were settled at Bradfield.

1786.

against

BUCKLE.

BURY.

field, but that which would have proved that they gained such

a settlement there in right of their father.

Another objection arises on the face of this order, that it The King was grounded on the examination of the grandmother, and not on that of the father, which ought to have been heard before

the justices made the order.

When this appeal came before the sessions, the father did not appear, neither was there any other evidence produced. but that of the grandmother, to prove either the identity of these children, or that the father had not gained a subsequent Therefore the sessions were well warranted in rejecting this, because not the hest evidence which the subiect afforded.

The other side was stopped by

The Court, who were clearly of opinion that there was no objection to the competency of this evidence (a). And as to the other point, that it was incumbent on the parish of Bradfield to have shewn that the father had gained a subsequent settlement.

> Order of sessions quashed. Original order confirmed.

(e) Vide R. v. Inhabitants of Creech St. Michael's, Burr. Set. Cases, No. 238.

## TINDAL and Others against BROWN.

Wednesday. . 10th وسكي

INDORSEES of a promissory note against the indorser. If the holder This cause first came on to be tried at the Sittings after give time to Easter term 1785, before Lord Mansfield at Guildhall, when of a bid, or the jury found a verdict for the plaintiffs. On a motion for drawer of a a new trial in the last Trinity term, the facts appeared to be note, after these; that on the 21st of August 1784, the note in question dishonored, was made by one Donaldson for 351. payable six weeks after the indorser date; that on the 5th October 1784, the day on which the is discharnote became due, allowing for the three days grace, one ged. Notice Howell (the plaintiff's clerk) called on Donaldson at ten in exchange, or the morning, and, not finding him at home, he left word promissory that the note was due, and desired Donaldson would send for note, being it at his master's where it lav, and take it up; that on the dishonored, next day, Wednesday the 6th of October, he called again on from the Donaldson, who told him he would take it up that day within holder.

the What is reatice to the

indorser of non-payment by the drawer of a promissory note, or acceptor of a bill of exchange, is a question of law.

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TINDAL against Brown.

the banking hours, which were from 9 to 4 o'clock; that the note not being taken up that day, he called again on Donaldson on Thursday the 7th, and not finding him at home, he was sent to the defendant Brown to tender the note, who refused to pay it, saying the plaintiffs had made it their own. Donaldson proved at the trial that immediately on his parting with Howell on Wednesday the 6th, he went to Brown's house, and not finding him at home he left a message with his wife that the note was due, that he (Donaldson) could not pay it, and desired that Brown would take it up, adding that he would make it good to him.

All the parties lived at Bristol within twenty minutes walk

of each other.

After argument by Lee and Morgan, for the plaintiffs, and Cowper and Baldwin for the defendant, the court delivered

their opinion to the following effect.

Lord Mansfield, Ch. J. On full consideration, I am now decidedly of opinion that there ought to be a new trial. It is of great consequence that this question should be settled. Certainty and diligence are of the utmost importance in mercantile transactions. It is extremely clear that the holder of a bill, when dishonoured by the acceptor, must give reasonable notice to the drawer or indorser. What is reasonable notice is partly a question of fact, and partly a question of law. It may depend in some measure on facts: such as the distance at which the parties live from each other, the course of the post, &c. But wherever a rule can be laid down with respect to this reasonableness, that should bé decided by the court, and adhered to by every one for the sake of certainty. I cannot form to myself an idea of the ground on which the jury went in giving this verdict. Did they conceive the rule to be that the holder might delay giving notice for two days, or what other time did they mean to allow him? Here an earlier notice might certainly have been given, as all the parties lived within twenty minutes walk of each other. The bill was dishonoured on the 5th, the clerk saw the maker on the 6th, and gave him time during the banking hours of that day: and the plaintiffs did not go at 4 that afternoon, but waited till the next day. has been held (a) that where the party liable does not live in the same place, the holder must write by the next post after the bill is dishonoured. It was well observed by the counsel that the juries were obstinate in the case of Metcalf and Hall (b), where they struggled so hard, in spite of the opinion

(a) Vide Dougl. 497.

b) Tr. 22 Geo. 3. B. R.



opinion of the court, to narrow the rule, that they held you must in certain cases demand payment on a banker's draft within an hour. Here the struggle is to give a greater latitude than is necessary. It was once doubted (a) whether notice within fourteen days was not sufficient. For the sake of diligence and certainty, I am of opinion that there should be a new trial.

TINDAL against Brown.

WILLES, J.—I agree that there ought to be a new trial. New credit was given to the maker on the 7th; the plaintiff's clerk went first to Donaldson to demand the bill of him, and after that they sent it to the defendant. As to the notice, I cannot consider the notice given by the maker equal to that given by the indorser. The plaintiffs have not acted with lead diliments.

legal diligence.

ASHHURST, J .- It is of dangerous consequence to lay it down as a general rule, that the jury should judge of the reasonableness of time. It ought to be settled as a question of law. If the jury were to determine this question in all cases, it would be productive of endless uncertainty. next day at the most is as long as is necessary in a case circumstanced like this. If the parties live at a small distance, this is sufficient time; if at a greater, they should write by the next post. Notice means something more than knowledge; because it is competent to the holder to give credit It is not enough to say that the maker does not intend to pay, but that he (the holder) does not intend to give credit. In the present case there is no notice; for the party ought to know whether the holder intends to give credit to the maker, or whether he intends to resort to the indorser.

BULLER, J.—The numerous cases on this subject reflect great discredit on the courts of Westminster. They do infinite mischief in the mercantile world; and this evil can only be remedied by doing what the court wished to do in the case of Metcalf and Hall; by considering the reasonableness of time as a question of law and not of fact. Whether the post goes out this or that day, at what time, &c. are matters of fact: but when those facts are established, it then becomes a question of law on those facts, what notice shall be reasonable.

As to giving time; the holder does it at his peril. And that circumstance alone would be sufficient to decide this case.

(a) V. Bull. N. P. 274 276.

TINDAL against Brown.

case. For in no case has it been determined that the indorser is liable after the holder of the note has given time to the maker.

With respect to notice, I concur in the opinion which has been given by the court, and particularly for the reason given by my brother Ashhurst. The purpose of giving notice is not merely that the indorser should know the note is not paid, for he is chargeable only in a secondary degree; but to render him liable, you must shew that the holder looked to him for payment, and gave him notice that he did so. A case might easily be put, where the indorser might have notice from the holder, and yet would not be liable; as if in the present case the holder had written a letter to the indorser, containing the circumstances which have been given in evidence, the indorser would have been discharged; because it would have amounted only to this; " the note made by "Donaldson, and indorsed by you, is not paid, and I have " given credit to Donaldson till to-morrow." Though there is no prescribed form of this kind of notice, yet it must import that the holder considers the indorser as liable, and expects payment from him, that he may have his remedy over by an early application: then it becomes his business to take up the note. But notice of having given credit to the maker will discharge the indorser. The notice by another person to the indorser can never be sufficient; but it must proceed from the holder himself.

The rule for a new trial being made absolute,

This cause was heard a second time before Buller, J. at the Sittings at Guildhall, after last Hilary Term, when, in addition to the evidence given on the former trial, one Weeks, the defendant's attorney, was called, who swore, that in a conversation which he held with Donaldson, on Thursday the 7th of October, concerning the note in question, Donaldson told him he was that moment come from Brown's, where he had left a message with Mrs. Brown, desiring her husband to take up the note; that the reason why he was so exact as to the particular day, and the expression made use of by Donaldson, was because he kept a minute of all his transactions; that his minute was confirmed in this respect by his memory; and besides that, at a meeting between the parties before the action was brought, this fact was admitted on both sides.

This jury, which was a special one, likewise found for the plaintiffs.

Cowper

Cowper baving moved this term for a new trial, on the

ground that this was a verdict against law,

Erskine now shewed cause, and admitted that it was not now to be disputed that what should be considered to be a resonable time was a question of law; but contended that in this case the plaintiffs had used due diligence, and had given the defendant notice within a reasonable time. That Donaddon ought to be considered as the agent of the plaintiffs for the purpose of giving notice to the defendant. That there was a contradiction as to the time when this notice was first given whether on the 6th or 7th of October, which contradiction arose from the testimony of Weeks, who was not produced at the former trial; and that circumstance might have afforded the jury some room for suspicion; but his was a point proper for the determination of the jury, who had decided it. That, at all events, the court should extremely cautious in granting a third trial; particularly whe sum in litigation was so small. That in Metcalf and Hall, which involved a similar question, the court had refused berant a third trial.

The counsel on the other side were stopped by

The Court, who referred to their former decision; and added, that even if the application had been made to the defendation the 6th, it would have been too late, because the plainish had given credit to the drawer. That though it was true is general that the court would refuse to grant a new trial when the sum in litigation was small, yet that rule did not applywhere a verdict had been given against law. That the reason why the court refused granting a third trial in the case of Metalism Hall was because the plaintiff had proved his debt under a commission of bankrupt, which had issued against the savees of the bill between the time of the verdict and the motion for a new trial.

Rule absolute (a).

TINDAL against BROWWN.

<sup>(</sup>a) On the third trial a special verdict was found, containing the same facts, which the Court gave judgment for the defendant; and that judgment was attempt a special was a special wa

1786.

Wednesday. *May* 10th.

### MACBEATH against HALDIMAND.

An officer appointed by government, treating as an agent for the public, to be sued upon conby him in that capaci-

THIS was an action upon promises against the defendant, as agent, for work and labour, &c.

Plea-the general issue.

The cause was tried at the Sittings after last Hilary Term before Buller, Justice, when a verdict was found for the deis not liable fendant by the direction of the Judge.

Upon a motion for a new trial by Cowper, the following facts

tracts made appeared from the report;

In the year 1779 the defendant, being Governor of Quebec appointed Captain Sinclair to the command of a fort called Michilimakingc, situated upon the lake Huron, in the province

On the 17th August 1779, the defendant transmitted certain instructions to Sinclair respecting the government of the fort in which he said,

"You are to pay great attention to the Indians resorting to " Michilimakinac, or furnished with necessaries from thence

"Endeavour to preserve them in good humour; and attach "them by every means in your power to the king's interest."

In a further part of the same instructions, he added,

"You will draw bills of exchange for defraying the contin

" gencies incident to that post in the manner practised by Ma " jor De Peyster, (an officer on whom the command had been "before conferred,) taking care to moderate and reduce those " expences, as far as can be done without injuring the king? " service."

For some time Sinclair employed one Grant to distribute presents among the Indians, and to procure military stores &c. for the use of the garrison; and, to defray these and other expences, drew bills of exchange upon the governor, accord ing to his instructions. When these accounts came to the defendant, he made objections to several of the articles as un necessary and exorbitant; and soon after recommended the plaintiff to Sinclair by a letter dated the 16th May 1782, o which the following is an extract:

"Upon an examination of the accounts accompanying "your late draughts, for expences incurred at Michilimaki " nac

1786.

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**B**EA**TH** 

against

HALDI-

" nac, the articles are in general charged at prices exceeding

" all bounds of moderation.

"Upon the comparison of the prices made here; the "advantage taken of the necessities of the crown by the tra-" ders at Michilimakinav is shamefully obvious; and it is " more so in the account of Mr. Grant, who appears to be an

" agent for government, than in any other particular.

" Persuaded that you have supplied your wants from those " traders in whom you have had the greatest reason to con-" fide, I find there is but little to be expected from any of " them residing at that post; which induced me to make en-" quiry if any person could be found here more worthy of the " public confidence. A Mr. Macbeath, who will deliver this "letter, and who has just made application for a pass, was " mentioned to me as a man of known and established inte-" grity; and, upon a more particular enquiry, I find that he " has always, both here and in the upper country, merited "that character. I have proposed to him to supply the "crown with such quantities of Indian corn and grease as "may be wanted for the necessary purposes at that post; " and likewise all other articles which shall occasionally be " wanted in the engineer department, which he has under-" taken to do for 101. per cent. on the market prices at the "place; (cost and charges); a profit which appears to be " reasonable, inasmuch as it is greatly under that hitherto " charged."

(After some orders given relative to the plaintiff,)

"These instructions, and all others that concern the inter-" est of the crown, I am persuaded that you will cheerfully " give him."

A letter from the defendant to the plaintiff, dated May

17th, 1782;

" Having thought it fit to direct Lieutenant Governor " Sinclair, commanding the post of Michilimakinac, to em-" ploy you in supplying such quantities of corn and grease, " and all other articles, as shall be wanted for the use of the " crown at that post, in consequence of your offer to fur-" nish the same at the rate of 10l. per cent. on the costs and " charges here and to Michilimakinac, for all articles (corn " and grease excepted), and these at the same rate where "they shall be purchased, for which sufficient vouchers are " to accompany your accounts, you are therefore hereby "directed to make applications from time to time to Lieu-" tenant Governor Sinclair for such directions, information, VOL: I. A<sub>c</sub> a

MAG. MAG. MEATH against HALUIP RRAND. "and assistance, as will best enable you to execute that bu"siness to the greatest advantage for the public interest, as
"your continuing in the employ will entirely depend upon
"your conduct therein."

Several special orders were proved from Sinclair to the plaintiff for supplying particular articles, amongst which was

the following, dated 1st of August 1782;

"You will be pleased for the future, without any requisitions in form, to provide for the different services of the
post, in the manner least expensive to government, and
still equal to the necessities of the different departments."

In pursuance of these orders the plaintiff furnished articles to a considerable amount. But when his bills, at the top of which was prefixed "Government debtor to George Macbeath for sundries paid by order of Lieutenant Governor Sinclair," were sent to the defendant at Quebec, he made objections to several of the articles as being unreasonable, and furnished contrary to subsequent instructions.

Afterwards, on the 2d of July 1784, Mathews (the defendant's secretary) wrote the following letter to Messrs. Dabie

and Forsyth, who were agents for the bill-holders;

"I am commanded by his Excellency General Haldimand" to acquaint you, that, in consequence of instructions from the Lords Commissioners of his Majesty's treasury, in answer to a representation made by him to their lordships, concerning the bills drawn upon him by Lieutenant Governor Sinclair in the year 1782, which he thought it necessary to refuse payment of, his Excellency, in conformity with the offer which he made to the holders of the said bills in the year 1782, is still willing to pay such parts of the charges, for which the said bills were drawn, as at that time appeared upon examination to be reasonable."

(After stating the amount of goods furnished for the engineer department to the value of 9266l. 5s. 1 1-2d. which the governor was willing to pay, the letter proceeded thus:)

"His Excellency will also pay for all the goods or utensils furnished for the engineer department, so far as they shall appear to be charged at reasonable prices, to be ascertained by merchants appointed for that purpose by his Excellency and the holders of the bills. And he will further pay for the labour, so far as the accounts thereof shall appear

"pear to be properly vouched. But with regard to the charges for the hire of horses and carts, his Excellency, from the exorbitance of the charge, will have nothing to do therewith, leaving nevertheless to the complainants to take such methods to procure redress therein, as they shall think proper.

MAG-BEATH against HALDS-MAND,

"With respect to the *Indian*, department, his Excellency will pay such part of the articles as compose the accounts, for which the bills were drawn, as were not purchased contrary to his orders to Lieutenant Governor Sinclair, dated 22d August 1781, and except also for the articles furnished by Lieutenant Governor Sinclair himself, which his Excellency will not pay, as they were received from the *Indians*, in expectation of being well repaid by the presents, which they afterwards received from the king's stores."

(The letter then stated the account of *Indian* expences amounting to 12,715%. 9s. 10d. and concluded by saying,)

"You will therefore see by the foregoing state, that the sum proposed by his Excellency General Huldimand to be immediately paid, amounts to 21,9811. 14s. 11 1-2d. New "York currency."

The bills which Sinclair drew in favour of the plaintiff were drawn on the defendant as Governor and Commanaer in Chief.

The plaintiff finding that all these bills drawn by Sinclair, and indorsed by himself, which were to a much greater amount than the above mentioned sum, would not be accepted by the defendant, received a partial payment from him, with a proviso, that it should not prejudice his claim for the remainder; to recover which was the object of the present action.

The plaintiff remained in his post till 1785.

It was acknowledged at the trial, and in court, that all the accounts had been submitted to a board of officers by the defendant for them to examine and report what charges ought to be allowed, and that the sum adjudged by them to be due, which fell very short of the plaintiff's demand, had been paid by the Treasury.

BULLER, Justice, after reporting the above facts, said, that he had been of opinion at the trial, that, the goods in question having been supplied for the use of government, and the defendant not having personally undertaken to pay, the plaintiff ought to be nonsuited. That it appeared to him that the plaintiff had acted with the defendant solely in the character of commander in chief, considering him as the agent

MAC-BEATH against HALDI-MAND. agent of government. That all the letters imported it to be a transaction on the part of government: and that the accounts confirmed it. But the plaintiff's counsel appearing for their client when he was called (a), he left the question to the jury, telling them that they were bound to find for the defendant in point of law. And upon their asking him whether, in the event of the defendant's not being liable, any other person was, he told them that was no part of their consideration: but, being willing to give them any information, he added, that he was of opinion that, if the plaintiff's demand were just, his proper remedy was by a petition of right to the crown. On which they found a verdict for the defendant.

The rule for granting a new trial was moved for on the

misdirection of the judge upon two points.

1st, That the defendant had by his own conduct made himself personally liable, which question should have been left to the jury.

2dly, That the plaintiff had no remedy against the crown by a petition of right, on the supposition of which the jury

had been induced to give their verdict.

Lord MANSFIELD, Ch. J.

Now declared, that the court did not feel it necessary for

them to give any opinion on the second ground.

His Lordship said, that great difference had arisen since the Revolution, with respect to the expenditure of the public money. Before that period, all the public supplies were given to the king, who, in his individual capacity contracted for all expences. He alone had the disposition of the public money. But since that time, the supplies have been appropriated by parliament to particular purposes, and now whoever advances money for the public service trusts to the faith of parliament.

That according to the tenor of Lord Somers's argument (b) in the Banker's case, though a petition of right would lie, yet it would probably produce no effect. No benefit was ever derived from it in the Bankers' case; and parliament was afterwards obliged to provide a particular fund towards the payment of those debts (c). Whether however this al-

<sup>(</sup>a) Vid. Watkins v. Towers, post, 2 vol 231. (b) Vid. 11 State Trials 159 (c) The Stat 12 & 13 W. 3 c 12, § 15 provides, that in lieu of the annuities granted to the bankers and all arrears, the hereditary excise shall, after the 26 December 1701, be charged with annual sums equal to an interest of 3 per cens, fill redeemed by payment of one moiety of the principal sums.

teration in the mode of distributing the supplies had made any difference in the law upon this subject, it was unnecessary to determine; at any rate, if there were a recovery, against the crown, application must be made to parliament, and it would come under the head of supplies for the year.

Bearcroft and Bower shewed cause.

They allowed that a person, acting in a public situation under government, might by his own conduct make himself personally liable for contracts, for which, from the nature of his office, he would not otherwise be answerable. plaintiff should make out a very strong case, in order to induce the court to believe that such was the agreement. if a person residing at a distance abroad, absolutely refused to treat with the government, but chose rather to rely upon the personal security of the Governor, who was upon the spot, and who was willing to treat upon those conditions. But, they contended in this case that the defendant had acted avowedly as the agent of government, and did not intend to make himself personally responsible.

But, considering this even as a common transaction between private parties, apart from public considerations, which would weigh in this case; the plain question would be, to whom was the credit given? It appears upon the face of it not to have been given to the defendant. The goods furnished were not for his use, and so the plaintiff knew. The defendant's letter to the plaintiff, when he was appointed to the post, expressly mentions that they were for the use of the The orders given by the defendant were in the quality of governor, and therefore the plaintiff must be taken to have contracted with government. It is no answer to say, that the bills were drawn on the defendant, for that is the common course of business: And the letter from Mathews. the defendant's secretary, speaks of an application to the treasury, which shews that it could not be considered as a personal demand on the defendant.

Supposing the defendant in the situation of a private steward, if it be notorious that the orders are given by him for his employer, and that he acts merely in the capacity of an agent, that is sufficient to shew the nature of the transaction, and to whom the credit has really been given.

In ordinary dealings, where it is a matter of doubt to whom the credit has been given, the question has frequently been decided by having recourse to the creditor's books, or

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MAC-BEATH against HALDI-MAND- by producing his bills, and seeing whom he himself has debited. In this instance the plaintiff has debited government.

Another circumstance is here disclosed, which decides as to whom the plaintiff gave the credit; for he first applied for payment to the Treasury, and on their refusal had recourse to the defendant, which manifestly proves that he considered government as his debtor.

They then mentioned the case of General Burgoyne, against whom a bill was filed in Chancery for a specific performance of a contract for the supply of artillery carriages in America. Lord Thurlow, Chancellor, said, that there was no colour for the demand as against the defendant, who acted only as an agent for government, and dismissed the bill with costs. His lordship also made the same observation which the learned judge made in this cause, that the plaintiff had his remedy against the crown by petition of right.

Cowper, Law, and Adam, in support of the rule, contended that the evidence which was produced at the trial was such as ought to have been left to the jury to determine, whether the

defendant had not made himself personally liable.

In general, a commanding officer is not answerable for stores and other articles furnished notoriously for the use of government, but there is no doubt that he may become so by his own conduct. Here the plaintiff was directed by the defendant to obey the orders of Lieutenant Governor Sinclair. Every article which he furnished was in obedience to Sinclair's commands; and Sinclair himself was instructed to draw bills for the payment of those articles, not on the government, or on any official paymaster, which would have afforded a strong presumption in discharge of the defendant's liability, but his orders were to draw on the defendant himself.

The partial payment, which was afterwards made, was under the special directions of the defendant, who, throughout the whole transaction, exercised his own discretion as to which part of the charges should be allowed or rejected. The defendant's own conduct therefore has made him personally liable.

Distance of place and situation might also have been a reason with the plaintiff for giving the defendant personal credit; for the parties being removed so far from the seat of government government at home, there was no other person to whom the 1786. plaintiff would so naturally look for payment as the defendant himself.

BEARM

againe

The production of the letters at the trial was an additional reason for leaving the question to the jury, whose province it was to determine the import of them.

In an action brought against General Burgoune to recover a sum of money due to the plaintiff as provost marshal, the defendant having promised that he should be paid at the same rate as the provost marshal under General Howe had been, a similar objection to the present was started on the trial by Lee against the legality of the action, but Lord Mansfield refused to non-suit the plaintiff; upon which he went into his case, and it afterwards appeared in the course of the enquiry that the plaintiff's demand had been satisfied. From this it is evident that his lordship thought that a commanding officer might make himself liable, and that whether he had or not, was a proper subject for the enquiry of a jury.

Taking this to be the case of a factor residing abroad, who transacts business for his principal in England; if the former had undertaken in the same manner that the defendant has done in this case, he would have made himself personally lia-

ble, since they may both be bound.

Supposing that the articles furnished were for the use of government, that will not vary the question. A master of a ship who contracts for necessaries for the use of the ship is personally liable, though he he known at the time not to be the owner (a). At all events, if there be any difference between this case and that of agent and principal to which the present is likened, yet every agent who personally undertakes cannot dispute his liability.

The whole question therefore should have been left to the jury, whose conduct proved that they entertained doubts upon it, till they were informed that the plaintiff had his re-

medy against the crown,

But if there be no remedy in the form of a petition of right against the crown, on account of the appropriation of the supplies since the revolution, and the public is to be considered as the real debtor, then there was no other person, against whom this demand could so properly be urged, as against

(a) Gowp. 639.

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MAG-BEATH orgainst HALDI-NAND. against the defendant, who represented and acted as ostensisble agent for the public in this transaction.

Lord MANSFIELD, Ch. J.

The only question before the court is, whether the defendant be liable or not in this action? If he be, the plaintiff must recover; if not, no consideration respecting the plaintiff's remedy against any other party can induce the court to make him so.

There is no colour to say that he is liable in his character of commander in chief.

In a late case which was tried before me, where one Savage brought an action against Lord North, as first lord of the treasury, in order that he might be reimbursed the expences which he had incurred in raising a regiment for the service of government, I held that the action did not lie.

So in another case of Lutterloh against Halsey, which was an action brought against the defendant, who was a commissary, for the supply of forage for the army, and by whom the plaintiff had been employed in that service, the commissary

was held not liable.

In the present case it was notorious that the defendant did not personally contract; the plaintiff knew, at the time that he furnished the stores, that they were for the use of government; and he afterwards made government debtor in his bills.

But it has been urged that the defendant made himself liable after the debt was contracted. In my opinion there is no ground for such an argument: The evidence does not warrant it.

Then it was objected, that whether the defendant had made himself liable or not was a question which ought to have been left to the jury to decide. But there was no evidence which was proper for their consideration; for the evidence consisting altogether of written documents and letters which were not denied, the import of them was matter of law and not of fact. Therefore I am of opinion that the verdict should stand.

WILLES, J. I think, under all the circumstances of the present case, that the defendant is not personally liable. The goods were furnished for the use of crown; government

\*\* 644

was made debtor; and all the letters speak of the transaction as having been considered in that light. Then if the defendant were liable, his person and property would be sub-MACBEATH ject to an execution, and he must afterwards apply to government for a reimbursement, which would be no satisfaction to him for the inconvenience he had been put to.

The letter from the defendant's secretary shews that what he did was under the direction of government, and that the fund, out of which the plaintiff was to be paid, was the treasury. And though I consider the faith of government as pledged for the acts of the defendant, yet I cannot consider

him as personally answerable.

As to the objection that this should have been left to the jury, it is decisive that this question comes before the Court on a motion to set aside the verdict, and not a nonsuit. There was no other evidence but letters, which were before the jury, and the judge had a right to give his opinion upon them. The construction of deeds is a matter of law, but that of letters is proper for the consideration of the jury.

ASHHURST, J. In great questions of policy we cannot argue from the nature of private agreements. But even in these cases the question must be, what was the meaning of

the parties at the time of entering into the contract?

A person acting in the capacity of an agent may undoubtedly contract in such a manner as to make himself personally liable; and that brings it to the true question here, namely, whether, from any thing that passed between the parties at the time, it was understood by them that the plaintiff was to rely upon the personal security of the defendant? But nothing appears from the evidence in this case to warrant such a conclusion. Government was made debtor; and it is evident that the plaintiff looked to them for payment: for he first made application to the treasury, and his demand against the defendant was only an after-thought, when he found he could not obtain the money in any other way. Then it seems to me that there is nothing in this transaction so fix the defendant or to shew that the plaintiff considered him as his debtor at the time that the credit was given.

Great inconveniencies would result from considering a governor or commander as personally responsible in such cases as the present. For no man would accept of any office of VOL. I. ВЬ trust 1786. trust under government upon such conditions. And indeed it has frequently been determined that no individual is anMACHEATH swerable for any engagements which he enters into on their spaint behalf.

HAND.

There is no doubt but the crown will do ample justice to

the plaintiff's demands if they be well founded.

BULLER, J. I do not agree with my brother Willes as to the construction of letters. If they be written in so dubious a manner, as to be capable of different constructions, and can be explained by other transactions, the whole evidence must be left to the jury to decide upon; for they are to judge of the truth or falsehood of such collateral facts which may vary the sense of the letters themselves: but if they be not explained by any other circumstances, then, like deeds or other written agreements, the construction of them is a mere matter of law.

In what character then, as appears from these documents, did the defendant act throughout this business? It is true that he gave the orders to Sinclair, and that every thing which the plaintiff did was pursuant to directions from the latter, whom he was instructed to obey; but these orders did not flow from the defendant in his own personal character, but as governor and agent for the public; and so the plaintiff himself considered it. And in any case where a man acts as agent for the public, and treats in that capacity, there is no pretence to say that he is personally liable.

Rule discharged (a).

(a) Unwin v. Wolseley, post. 674. S. P.

Wednesday, May 10th.

# SPROAT against MATTHEWS.

Where a bill of exchange was drawn upon This was an action by an indorsee of a bill of exchange against the acceptor. The bill was drawn on the defendant, and

of goods living abroad; and on its being presented for acceptance, A. said, he could not then accept, because he did not know whether the ship would arrive at London or Bristol. B. the holder of the bill agreed to leave it for some time, reserving the liberty of protesting it for non-acceptance ir m that day, in case A did not accept: On a second application A. said, the bill would be paid even if the ship were lost: This is only a conditional acceptance, depending on two events, of the ship's arriving at London, or being lost. And B. having the liberty of refusing such conditional acceptance precludes himself from recovering against A. by afterwards noting the bill for non-acceptance. Whether a conditional or an absolute acceptance, is a question of love.

and was made payable forty days after sight to one Lenox or order. Allen, the plaintiff's clerk, swore that on the 24th of September 1785 he presented the bill to the defendant, who lived in London for acceptance, who told him "that the "drawer had consigned a ship and cargo to him and another "person at Bristol, but as he could not then tell whether the "ship would arrive at London or Bristol, he could not ac-"cept at that time;" upon which Allen said that he would leave the bill upon this condition, that in the event of the defendant's not accepting it from the day when it was presented, he should be at liberty to note it for non-acceptance as from that time. To this the defendant assented, and the bill was accordingly left at his house till the 8th of October. when Allen called again, in company with the plaintiff, to know whether the defendant would accept the bill or not, who on being pressed to accept said "the bill was a good "one, and that it would be paid, even if the ship were lost."
Allen immediately upon this carried the bill to a notary public, and had it noted for non-acceptance from the time when it was first left with the defendant. The ship afterwards arrived safe at the port of London, and the cargo was disposed of by the defendant.

SP OAT against MAT-THEWS.

BULLER, J. who tried this cause at the last Sittings at Guildhall, being of opinion that this amounted only to a conditional acceptance, which the plaintiff was at liberty to refuse or not as he chose, and that his noting the bill immediately after the second conversation shewed that he was not satisfied with such conditional acceptance, nonsuited the plaintiff.

This motion had been made on two grounds:

1st, That this must be considered as an absolute acceptance. 2dly, That even if it were a conditional one, it should have been left to the jury to consider whether the plaintiff had precluded himself by his subsequent conduct from recover-

mg against the acceptor.

Wilson and Baldwin, against the rule contended that this was only a conditional acceptance; and it was clear that it was so understood by the parties at the time; for, if the plaintiff had considered it as an absolute acceptance, he would not have protested it immediately for non-acceptance. No person could explain the conversation which took place between the parties so well as themselves; and the acts of the plaintiff proved what impression it made on him. After the plaintiff had protested the bill for non-acceptance he ought not to be permitted to the was satisfied with the acceptance: It is conclusive against him. For by noting the

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bill for non-acceptance he gave up the defendant altogether. Then it ought not to have been left to the jury to consider whether the parties had misunderstood the conversation.

Erskine and Wood, contra, insisted that the second conversation alone amounted to an absolute acceptance; if so, nothing which the plaintiff did could be a waver of it. The words "even if the ship were lost" can only admit of one grammatical construction. It is taken for granted that the bill would be paid if the ship arrived safe; and these words import that it would be paid at all events, whether the ship were lost or not.

Then taking the second conversation as explanatory of the first, it proved that the defendant only doubted at first on the event of the ship's arrival at London; but that doubt was put out of the question by the subsequent conversation, when he said he would accept at any rate, even if the ship were lost; that is, even if that event should take place

which he apprehended and doubted at first.

But supposing the acceptance to be conditional, the event, on which the defendant was to accept, having happened by the arrival of the ship at London, the only point to be considered was, whether the plaintiff had precluded himself by his subsequent conduct in noting the bill from having recourse to the defendant, this might be reconciled, from considering the purport of the bill, which was payable 40 days after sight. The noting of the bill was not for the purpose of protesting it for non-acceptance, but only in order to ascertain the time when it was presented for acceptance. At all events, if there were any ambiguity in the transaction, either respecting the acceptance, or the waver of it, it should have been left to the jury to consider whether, under all the circumstances, the plaintiff had precluded himself from recovering on this acceptance.

Lord Mansfield, Ch. J. was absent on this day, and con-

tinued absent during the rest of the term.

WILLES, J. Whether this nonsuit was right or not de-

pends on two questions;

1st, Whether this was an absolute, or a conditional acceptance? In determining which we must consider the two conversations between Allen and the defendant together. When the bill was first presented to the defendant for acceptance, he said he could not accept at that time, because he did not know whether the ship would come to London or not.

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The reason of this answer is obvious, because if the ship arrived at Bristol, she was consigned to another person. Then in a subsequent conversation he said "the bill will be paid, "even if the ship be lost." So that he accepted on two conditions; namely, the one, if the ship came to London, in which case he would be enabled to pay himself with the profits of the cargo; the other, in case the ship was lost, when he would have wherewithal to satisfy the bill, he having a policy of insurance on the ship in his hands: but he did not accept in the third instance, which was in the event of the ship's going to Bristol.

The Court has not of late been very nice with regard to what shall be construed to be an acceptance. For though formerly it was held necessary that an acceptance should be in writing, yet of late years a parol acceptance has been deemed sufficient. And indeed at present almost any thing amounts to an acceptance. Therefore if there were a doubt whether this was a conditional or an absolute acceptance, or whether (admitting it to be a conditional one only) the party had precluded himself by his subsequent conduct, the whole of the facts should have been left to the jury. So that I am

of opinion that the nonsuit ought to be set aside.

ASHHURST, J. I do not concur with my brother Willes, that this nonsuit ought to be set aside. In the case of a written acceptance, the acceptance speaks for itself. But this being a parol acceptance, the conduct of the plaintiff is decisive against him. And the evidentia rei shews that he put the right construction on this transaction by procuring the bill to be noted. On the first conversation the defendant expressed a doubt whether the ship would come to London or to Bristol; if to London, he would have had effects in his hands to indemnify himself, because the cargo was consigned to him; if to Bristol, it was consigned to another person. Then it was agreed between the parties that the bill should be left with the defendant, with liberty to the plaintiff to note it as from the first tender of the bill, in case the defendant should not eventually accept. the second conversation, the defendant is represented to have said "the bill will be paid, even if the ship be lost." The witness might have varied this phrase. events this only amounted to a conditional acceptance, in case the ship arrived at London, or was lost; which the plaintiff afterwards waved. If the party had conceived it to be an acceptance, he should have required that to be sigSPROAT against MAT-

nified on the bill itself. Then it was said that the reason why the bill was noted was to mark the time from which it was to be considered as accepted; but that might have been better effected on the bill, by accepting it as from that day. Then it is manifest that the parties understood at the time that the matter was left unconcluded. If so, the plaintiff is absolutely bound by his subsequent act; for he protested the bill for non-acceptance; therefore there could be nothing to leave to a jury.

BULLER, J. We are now to determine on a point of law. which is decisive that this question ought not to have been left to the jury. Whatever may have been the doubts formerly of what amounted to an acceptance, I conceive it is the sole province of the Court to decide whether this is an absolute or a conditional acceptance. This case was proved by one witness on the part of the plaintiff; the defendant's counsel admitted this evidence to be true, but insisted that upon that evidence the defendant was not liable in point of law. Then there was nothing to be left to the jury. the defendant had objected at the trial that the plaintiff's witness might be mistaken in his expressions, that might properly have been left to the jury, who are to decide on the credit or accuracy of a witness. Then supposing these facts had been stated on a special verdict, the Court would have been bound to determine whether this, in point of law, was an acceptance or not. And this brings it to the true question before us, namely, whether this is a conditional or an absolute acceptance. There is no ground for saying it was an absolute one. It was not thought of at the trial; and the words of the defendant preclude every idea of it. Taking both the conversations together, it is decisive against the plaintiff. At the first conversation the defendant said, I do not know whether the ship will come to London, and therefore I cannot accept at present. At that time then he only intended to accept in the event of the ship's coming to London; at the second he said, " the bill will be paid even " if the ship be lost:" both the conversations therefore amount to this, that there were two events in which the bill would be paid, the one, if the ship came to London, the other, if she were lost. It is evident from what passed that the defendant did not intend to accept, unless he had wherewithal in his hands to reimburse himself. If the ship came to London, he had the disposal of the cargo; if she were lost,

he was in possession of the policy. This therefore was a conditional acceptance; and in these cases the holder may choose whether he will be satisfied with it or not: but here the plaintiff has waved it by protesting the bill for non-acceptance. And his reason for noting it for non-acceptance, as from the first day, was that he might proceed against the drawer for interest for a longer time.

1786. SPROAT against MAT-THEWS.

Rule discharged.

#### BORMAN against BELLAMY.

Thursday, May 11th-

N shewing cause against a rule to set aside the proceed- Proceedings ings in this cause for irregularity, it appeared that the set aside, defendant had been served with a bill of Middlesex in the City bell of Midof London.

It was contended by the counsel against the rule, that as served in the this writ was only for the purpose of bringing the defendant city of Loninto court, it was immaterial in what place it was served, And that this Court had refused in several instances to set aside the proceedings on this ground.

BULLER, J. The cases mentioned at the bar are where a latitat has been served in the wrong county. There the writ is the same, and it makes little difference whether served in one or the other county. But there is no instance in which this Court has not determined that the service of a bill of Middlesex in London is irregular, except where there has been some dispute about the limits of the city of London.

Baldwin, for the plaintiff. Wood, for the defendant.

(a) Rule absolute.

(a) Vide Dougl. 369.

## CAZALET and Others against ST. BARBE.

Friday, May 12th.

THIS was an action on a policy of insurance upon the Owners of ship Friendship from Wyberg, to Lynn, subscribed by ships are not entitled to athe defendant for the sum of 100l. at 2 guineas per cent.

The defendant pleaded a tender of 481, which sum was less at some paid into court.

bandon, unperiod of the voyage there

The has been a total loss.

And where the jury have found only an average loss occasioned by the perils of the sea, the court are precluded from saying there has been a total loss,

The cause came on to be tried at the Sittings after Hilary term 1786, before Buller Justice, when the following case CAZALET was reserved for the opinion of the Court. against

That the defendant under-wrote the policy, as stated in

St. Barbe. the declaration.

> That the damages sustained by the ship in the voyage insured do not exceed 481. per cent. which sum the defendant hath paid into court, upon pleading in this action.

That when the ship arrived at the port of Lynn she was

not worth repairing.

The question for the opinion of the Court is, Whether the plaintiffs have a right to abandon? If the Court shall be of opinion that the plaintiffs have a right to abandon, then a verdict to be entered for the plaintiffs, damages 521. and costs 40s.: but if the Court shall be of opinion that they have not a right to abandon, then a verdict to be entered for the defendant.

S. Heywood, for the plaintiff, made two points.

1st, That though a ship has gained her destined port, yet, if upon her arrival, she is so much damaged as to be unfit for future service, and not worth repairing, the insured may abandon, as in case of a total loss.

2dly, Under the circumstances of this case the plaintiffs

had a right to abandon as for a total loss.

1st, Total loss is a technical expression. The risk insured against is of two kinds, on the ship, and on the voyage. There may be a total loss without an absolute annihilation of the ship; as if the owner be deprived of the subject matter, or it be rendered useless to him; the one happens in the case of capture, or detainment by foreign princes; the other

in such instances as the present.

At the time this vessel arrived at Lynn, she was entirely useless to the owners, and was to all intents and purposes a total loss, though the planks remained together. Wherever a vessel arrives with her death's wound, it is a total loss within the policy, as much as if she had actually been destroyed. She is no longer considered to exist. In a case of Bond and Hunter, tried before Lord Mansfield at Guildhall, 1781, where a ship was insured on her outward and homeward bound voyage to Quebec, and back again; when the ship arrived at Quebec, she was in so bad a condition that she was instantly condemned as unfit for future service. The insured sued the under-writer on the homeward bound voyage;

voyage; Lord Mansfield was of opinion, that the ship having arrived with her death's wound in her, the homeward bound policy had never attached, any more than if she had been lost CAZALET in the outward bound voyage.

It is not the bare existence of the ship and cargo which is the object of the insurance; but if any thing has happened during the voyage, by which the ship is totally disabled and rendered useless to the owner, her arrival at the port of destination will not discharge the under-writer, who warrants her to be moored in safety twenty-four hours; for the damage has happened before that time. Fitzgerald v. Pole, 5 Brown's Ap. 131. Jenkins v. Mackenzie, Ibid. 141. (a)

The insurance being both upon the ship and the voyage, though the latter be completed, yet the insurer may still be liable; as was held by Lord Mansfield in the case of Roxburgh v. \_\_\_\_, Mich. 23 Geo. 3. Hussey and Hewitt (b), decided the same point. So if the voyage be lost, though the ship return into the possession of the owner, and is by

him taken to pieces, Arnold and Godin (c).

By the mercantile law of France, if, when a ship insured. arrives at her port, she is found unfit for any future voyage, and not worth repairing, it is considered as a total loss.

Emerigond, 181. 591.

If the ship had been sunk within a small distance of the harbour of Lynn, it would undoubtedly have been a total loss: then the insured ought not to be in a worse condition, from the circumstance of having done all in their power to encrease the salvage of the under-writer, by bringing the vessel at some hazard and trouble into port, than they would have been if they had deserted the ship, and she had actually been lost. would be a discouragement to owners in cases of any danger to endeavour to preserve the ship.

2dly, Under the circumstances here stated the insured had a right to abandon, and if the Court are of that opinion in point of law they will not consider themselves precluded by the finding of the jury, that the damage sustained was only

481. per cent. He then cited 2 Valin. 115,

Baldwin, contra, was stopped by the Court.

WILLES, J. The question is whether under these circumstances the plaintiff had a right to abandon; or, in other words, whether the plaintiff can turn a partial into a total loss?

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(a) Vide Goes and another v. Withers, 2 Burr. 683. (b) Beames Lex Merc. 4th edit. 29% (c) Beawer Lex Merc, 4th edit, 311:

1786. CAZALET against St. BARES.

The finding of the jury in this case determines the question, because it is expressly found that the damage did not exceed 48l. per cent. The case then states that the ship was not worth repairing, but no mention is made of what was her real worth; so that the remaining materials of the ship, if sold, may make up the difference between 48l. and 100l. per cent. There has been no loss either of the ship, or of the voyage; but, being an old ship, she suffered so much that she was not worth repairing. I cannot now determine that there has been a total loss, when the jury have already said that there was only a loss of 48l. per cent.

As to the case of *Bond* and *Hunter*, this question never occurred in it. The action was brought upon the homeward-bound policy. It was sufficient to say that that policy had never attached, for the ship had received her death's wound

in her outward bound vovage.

In the case of Mills and Fletcher, a total end was put to the voyage. In the other cases, the question arose upon losses which had happened during the several voyages: here the voyage has been performed, and the ship is arrived; and after the jury had found that the damage sustained did not amount to more than 481. per cent. the Court are precluded from saying it was a total loss.

ASHHURST, J. The facts found in this case preclude any question, whether this can be construed to be a total loss. If the insurers should be held liable here, it would be making them insure the goodness of the ship; and if the owners can recover as for a total loss in this case, they might equally have recovered on account of the bad condition of the vessel, though

she had not received much damage at sea.

It is not stated that this ship received her death's wound in the course of her voyage. When she came into port it was found that she was not worth repairing; but non constat that if she had not received any damage during her voyage, she would have been worth repairing. And though the vessel was not in a sound state, yet she had arrived in safety twenty-four hours; and the jury having exactly defined what degree of damage she had sustained, we cannot say that the plaintiffs ought to recover any more.

BULLER, J.

BULLER, J. Nothing can be better established then that the owner of a ship can only abandon in the case of a total The cases which have been cited went upon that CAZALET ground. In the case of Jenkins and Muckenzie, though the against ship was brought into port, yet the capture, as between the assurer and the assured, was a total loss.

But there is no instance where the owner can abandon, unless at some period or other of the voyage there has been a to-No such event has happened here: for the jury have expressly found that the loss amounted only to 481. per

cent.

Even allowing total loss to be a technical expression, yet the manner in which the plaintiff's counsel have stated it is rather too broad. It has been said, that the insurance must be taken to be on the ship as well as on the voyage; but the true way of considering it is this, It is an insurance on the ship for the voyage. If either the ship or the voyage be lost. that is a total loss; but here neither is lost.

The case of Hamilton and Mendez (a) is decisive.

Iudgment for defendant.

(a) 2 Burr. 1211. and Vid. Furneaux v. Bradley, E. 20 Geo. 3. Park on Insurence, 2d ed. tit. Abandonment,

#### ROBERTSON against DOUGLAS.

Saturday. May 13th,

HIS was a rule to shew cause why the proceedings should The declara. tion need not

not be set aside for irregularity.

The defendant was in custody at the suit of the same plain-be delivered to the defentiff for another cause of action. The latitat in this second dant personal action (which was not bailable) was returnable on the 28th ally, or to January, 1786. On that day the declaration was left in the the gaoler, office, and the writ was not served on the defendant till eight the defendant o'clock on the same evening.

This rule was obtained on two grounds.

1st, I hat the defendant being in actual custody, the decla-suit of the ration ought to have been delivered either personally to the tiff, for the defendant, or to the gaoler of the prison in which the defend- same cause ant was confined.

t was confined.

2dly, That the defendant was not in court as to this second letitat at action when the declaration was left in the office.

Bearcroft, Erskine, and Wood, now shewed cause.

ant is in custody at the same plain, of action. eight o'clock in the even-They day, when it is re urnable.

is good, tho' the declaration be left in the office in the course of the same day;

They admitted, that by the statute of the 4 & 5 W. & M. c. 21. where a defendant is in actual custody, the declaration ROBERTSON in that suit in which he is arrested must be delivered either to him or to the gaoler; but that in the present case, the pro-DOUGLAS. cess, although it was at the suit of the same plaintiff who had charged him in custody, was in another action, which was not bailable. Before the passing of that act it was necessary to bring up a prisoner by habeas corpus, in order to charge him with a declaration in the action in which he had been arrested: but that statute was passed to relieve plaintiffs from the trouble and expence of bringing up prisoners by habeas corpus, and can only affect those defendants who are in custody. Here the defendant was not served with this latitat in the second action for the purpose of charging him in custody. If any other person had commenced an action against this defendant after he had been charged in custody by the present plaintiff in a former action, there could have been no colour for this motion: and it can make no difference when ther it be at the suit of this plaintiff or any other person, since he was not arrested in this action.

As to the second point, they insisted that the court could not enquire into the exact time of the day when the declaration was left in the office. And that it had been determined that the service of a writ on the day when it was returnable was good; even though it were not served till after the rising of the Court (a). At all events the defendant was too late in his application to the Court, for he should have made this motion last term.

Cowper and Mingay, in support of the rule, now abandoned the first point; but contended on the second, that, as the latitat in this action was not served till eight o'clock of the day on which it was returnable, the declaration in all probability was left in the office before the writ was served.

That in the case of a prisoner the Court would allow a greater length of time to apply in this mode than in other

cases.

BULLER, J. mentioned a case of Ward and Wilkinson, where the Court refused to set aside the proceedings, though the notice of declaration was not served till half past ten o'clock. Besides, the defendant should have made his application sooner: he is now out of time. If a prisoner be entitled

(a) Vid. Burr. 812.

entitled to be superseded, he may always apply for that purpose: but if he come on a mere irregularity, he is in the same situation with any other defendant. Then on the other ROBERTSON ground, the stat. of 4 & 5 W. & M. has nothing to do with the present motion: that is only applicable to those cases where the party is in custody, and is served with a declaration in the same action.

Rule discharged.

#### BEABLE against DODD,

Tuesday. May 16th.

THIS action of replevin, in which the defendant made 4. devised cognizance for rent, in arrear, was tried at the last as-lands in trust sizes for the county of Devon, before Hotham Baron, when a rents and verdict was found for the plaintiff, damages 1s. costs 40s. profits to his subject to the opinion of the court of king's bench on the fol-daughter lowing

Case. William Ley, being seized in fee of the premises then living) upon which the distress was taken, being part of the manor for her life, of Wranguton, made his last will and testament, duly exe-notwithcuted, and bearing date the 8th day of September 1776, and coverture, thereby devised all that his manor of Wrangaton, situate, and not to be lying, and being within the parish of Ugborough in the subject to any county of Devon, and also all that his messuage and tenement, control, &c. with the appurtenances thereunto belonging, situate at, or band, nor licalled, Wrangaton, in the said parish of Ugborough, then in able to any the possession of Christopher Emmett unto Jacob Ley, his debts which he bad or heirs and assigns, for and during the natural life of his should condaughter Anne Churchward; upon trust nevertherless that he ract; afterthe said Jacob Ley, his heirs and assigns, should from time to wards the time, during the life of his said daughter Anne Churchward, a codicil, pay the rents, issues, and profits thereof unto the said Anne taking notice Churchward, or unto such person or persons, in such parts of the death and shares, and for such uses, intents, and purposes, as the said of bis daugh-Anne Churchward, by any writing or writings under her hand, wherein he from time to time, notwitstanding her coverture, should ratified and limit and appoint, and not into her husband's hands, nor confirmed to be subject to any control, management, or disposal of her The daugh-husband; nor liable to any debts which he had, or should teris enticontract, the same being designed by him for her separate use tled, under and benefit, and to be at her own disposal notwithstanding this devise, to the rent

her and profits,

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BEABLE against Doop.

her coverture; with divers remainders over; and in default of issue of the said Anne Churchward, remainder to the said Jacob Ley, his heirs and assigns, for and during the natural life of his daughter Alice Fowler; upon trust nevertheless that he the said Jacob Ley, his heirs and assigns, should from time to time, during the life of the said Alice Fowler, pay the rents, issues, and profits thereof, unto the said Alice Fowler, or unto such person and persons, in such parts and shares, and for such uses, intents, and purposes, as the said Alice Fowler, by any writing or writings under her hand, from time to time, notwithstanding her coverture, should limit and appoint, and not into her husband's hands, nor to be subject to any control, management, or disposal of her husband, nor liable to any debts which he had or should contract, the same being designed by the testator for her separate use and benefit, and to be at her own disposal notwithstanding her coverture; with remainder to the said Jacob Ley and his heirs, for and during the natural life of his said daughter Alice Fowler, in trust to support and preserve the contingent remainders thereinafter limited from being defeated and destroyed; and from and immediately after the death of the said Aice Fowler, remainder to the issue male of the said A e Fowler in tail, remainder to her issue female, with several remainders over. That the said William Ley, by his said will, did in like manner devise to the said Jacob Ley and his heirs, certain estates lying in the parish of Torbryan, in the said county, during the life of his said daughter Alice Fowler, in trust to pay the rents, issues, and profits thereof unto the said Alice, or unto such person and persons, in such parts and shares, and for such uses, intents, and purposes, as she the said Alice Fowler, by any writing under her hand from time to time, notwithstanding her coverture, should limit and appoint, and not into her husband's hands, nor to be subject to any control, management, or aisposal of her husband, nor liable to any debts which he had or should contract; the same being designed by the testator for her separate use and benefit, and to be at her own disposal, notwithstanding her coverture; with like remainders over, as are limited with respect to the manor of Wrangaton.

The said William Ley did also by his said will devise a cermeadow called Willia's, to the said Jacob Ley and his heirs, in trust to pay the rents to the said Anne Churchward for her life, remainder to her sons successively in tail, remainder to her daughters in tail, remainder to his own right heirs.

That

That Anne Churchward in the said will named, at the time of making the same, was married to one Jumes Churchward, and the said Alice Fowler to one John Fowler in the said will named, and that between the time of making the said will and the time of making the codicil hereinafter mentioned, the said John Fowler died, leaving the said Alice his widow, who after the death of the said William Ley, intermarried with Francis Thomas Rybot, and is the same Alice Rybot in the pleadings in this case mentioned.

That on the 17th day of July 1778, the said William Ley made and duly executed a codicil to this said will, and thereby took notice of the death of the said John Fowler, and ratified and confirmed the said will, and all the gifts, devises, and bequests, matters and things therein contained, not thereby altered and revoked; and by his codicil made no mention of the manor of Wrangaton, but confirmed the said devise of the lands in Torbryan, and afterwards died seised thereof.

That in consideration of the real and personal estate, which the said Francis Thomas Rybot was to have and receive with the said Alice, and which personal estate is admitted by the said Francis Thomas Rybot to amount to the sum of 738% the said Francis Thomas entered into a hond, to certain persons therein named, in the penalty of 2000/. bearing date previons to the said marriage, but executed after it, and reciting an agreement that if the said marriage should take effect, he would pay the sum of 1000% to the uses thereinafter mentioned and conditioned for the payment of the said 1000l. the interest of which was to be paid to the said Alice to and for her separate use during her life, and after her death to be divided among the children of the marriage. And by certain deeds of lease and release, made and executed after the said marriage, reciting that the same were executed in pursuance of articles of agreement made previous to the said marriage, divers estates in the said county of Devon (among which were the said several lands lying in the parish of Torbryan), being the whole estates of which the said Alice was then in possession (excepting the third part of a leasehold estate, held for a term of years determinable on lives, the armual net value of which third part did not exceed 1/ 10s. and excepting a messuage and garden with the appurtenances, and a close of meaflow or pasture called May Pool, containing about one acre and an half, in the parish of Paiguton in Devon, which was expressly excepted out of the said articles of agreement,

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were conveyed to certain trustees in trust during the life of the said Alice, to convey the same in such manner, and for such uses and intents, and to such persons, as the said Francis Thomas and Alice should appoint, and for want of such joint appointment, in trust for the separate use of the said Alice, exclusive of the said Francis Thomas; and also in trust to pay the rents, issues and profits thereof, during the life of the said Alice, to her sole and separate use, without the control of her said husband.

That no joint appointment has as yet been made. That the said Alice Rybot and Francis Thomas Rybot afterwards agreed to live separate and apart, and upon such separation a separate maintenance of 45l. per annum, and no more, was secured to the said Alice by deed, by which deed (reciting that the sum of 1000/. mentioned in the bond made on the marriage of the said Francis Thomas and Alice had not been paid to the trustees therein mentioned, and that it had been agreed that no suit should be commenced against the said Francis Thomas for the same during the life of the said Alice, and whilst the said annuity of 45% should be duly paid to her, which said annuity is thereby declared to be considered only as interest for the said sum of 1000l. at and after the rate of 41. 10s. per annum, the said Francis Thomas covenanted to pay to the said Alice during her life the said sum of 45%. in lieu of the interest of the said 1000/. And which sum, together with the settlement made on the said Alice previous to her marriage with the said Francis Thomas Rybot, was agreed to be for the sole and separate use and maintenance of the said Alice during their separation.

That the said Anne Churchward died without issue after the death of the devisor, and after the said separation; and that thereupon the said meadow called Willis's vested in the said Alice Rybot and Elizabeth Windsor, as the right heirs of the said William Ley the devisor; and that the clear annual value of the lands called Willis's mentioned in the said will, and comprised in the said marriage settlement, amounted to

31. 3s. per annum.

The question for the opinion of the Court is, Whether the said Alice Rybot is entitled to the rents, issues, and profits of the premises in the pleadings mentioned, parcel of the manor of Wrangaton, free from the control of her present husband Fran-

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cis Thomas Rybot? If so, the verdict to stand;—if not, then a verdict to be entered for the defendant upon the first issue for the sum of 101. 10s., being the amount of the rent in arrear at the time of the distress, and the value of the distress.

Gibbs, for the plaintiff, after observing that this question involved in it the whole of the manor of Wrangaton, made

two questions;

1st, Whether on the construction of the will and codicil of William Ley, and the event which happened between the times of making those instruments, Alice Rybot is entitled to receive the rents and profits, &c. of the manor of Wrangaton.

2dly, Supposing that she is so entitled under the will and codicil, whether the circumstances which happened upon and after the marriage and on the deed of separation, deprived her of that dominion over the rents and profits, &c. which she had before.

As to the second question. The argument on the other side must be, that Mr. Rybot on his marriage made such a settlement on his wife, that the Court must conclude that it was her intention to give up every thing to him. In determining this, it will be necessary for the Court to consider the several instruments in order of time. The first was a bond from Rybot in 1000l. to trustees, in trust for Alice Rybot, in consideration of the real and personal estate which he was to receive with her. It appears from the case that some part of the premises was excepted in the lease and release, which conveyed the estate to trustees for her separate use, in case there was no joint appointment made; therefore there was something to satisfy the words relating to the real estate; and as to the personal estate, it is acknowledged that it amounted to nearly as much as was settled upon her.

The lands which are comprised in the deed of settlement by lease and release did not come from F. Rybot. There was no consideration from him; they were her lands; and sho

took nothing from his estate.

With respect to the deed of separation which secured to her an annuity of 45% it is expressly stated to be in lieu of the 1000% to which she was entitled under the bond: so that Vol. I. D d

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there was no new consideration for this; and in fact she was put in a worse situation than before. No argument can be drawn from these deeds, that Mrs. Rybot intended to give up the premises in question, to which she was entitled under the will; for, at the time of the marriage the prospect of coming into the possession of these premises, depending upon the event of her sister's dying without issue, was not so immediate as to induce the Court to suppose they were in the contemplation of the parties. If it had been the intention of these parties that the husband should take this estate, they would have added express words for that purpose.

Then laying out of the case every thing which passed sub-

sequent to the death of the testator;

He considered the question as it stood upon the will and

codicil.

The words of the will evidently indicate the intention of the devisor to have been that Mrs. Rybot should solely enjoy the estate independent of John Fowler, or any future husband. For he devised this manor to " J. Ley in trust to " pay the rents and profits thereof to A. Fowler, during the "term of her natural life, notwithstanding her coverture, " nor to be subject to any control, management, or disposal " of her husband, nor liable to any debts which he had or " should contract." Barely stating the words of the will furnishes the argument in support of this construction. But a still stronger argument arises from considering the event which happened between the dates of the will and the codicil. The case states that John Fowler died between the time of making the will and codicil. The codicil took notice of the death of J. Fowler, and ratified and confirmed the will. Therefore the will must be considered as bearing date with the codicil. And then these words must have relation to a future husband, otherwise they are absurd and nugatory.

Lawrence for the defendant,

Insisted, 1st, That the restrictions in the will of the testator were not intended to extend to any future husband, but were meant to be confined merely to her then husband J. Fowler. The situation of the devisor was material to be attended to in construing this will. He had two daughters at the time of making it, both of whom were then married.

And he devised his estates to trustees to the use of his daughters, in exclusion of both their husbands. The words in the devise to Alice are, " nor to be subject to any control, ma-"nagement, or disposal of her husband, nor liable to any " debts which he had or should contract, the same being de-"signed by the testator for her separate use and benefit not. "withstanding her coverture." At the time of making this will Alice had a husband; so that there was a subject matter to which this restriction might with propriety be applied. Then it would be strange to argue that the testator at the time of making this devise, was guarding against the event of the death of her first husband, and of her taking a future one. If there be a doubt on the words of the will, and there be a subject matter to which they can relate, it is more consonant to reason to refer them to that subject matter, than to any thing foreign to it. According to the argument on the other side the Court must add the words "or any future husa band" to the restriction in question. " Any debts which "he had contracted" must indisputably relate to her then husband: and when the testator added the words " or which "he should contract," he still alluded to the same person, If the natural reference of these words be to the person to whom Alice was then married, and this was respecting his debts, the codicil stated in the case cannot make any difference. A codicil confirming a will cannot go beyond the will itself. So a deed of confirmation cannot enlarge a former deed (a). As to the death of Fowler before the making of the codicil, the codicil being only a confirmation of the will, the confirmation is good, as far as there was any subject mata ter in the will to be confirmed by the codicil; and those words in the will, to which there was nothing to be referred at the time of making the codicil, may be rejected as nugatory. As the codicil therefore only confirmed the will, unless it can be shewn that the will, at the time of its being made, extended to any future husband, there is no pretence to say that the codicil does. If this clause, instead of being restrictive, had contained a devise to the husband of Alice Fowler, and that husband had died before the making of the codicil, it could never be contended that any future husband could take under such devise. There would have been an end of the devise the instant such husband died. As therefore a future husband could not have been benefited, it would

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BEABLE against Doddy.

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be unjust to subject him to any disadvantages under such a devise.

Where a first husband conveyed a term in trust to the separate use of his wife, it was determined that a second husband might dispose of it. Tudor and Samyne, 2 Vern. 270. 1 Vern. 7. But in this latter case, the Court said it would be otherwise if the term were assigned in trust for the wife, with the privity of her husband.

He then contended on the other point, that even admitting that Alice was entitled to the rents and profits of the premises in question by virtue of this devise, to her separate use, in exclusion of any future husband she might take, yet that

she had subsequently given up that right.

This claim is derogatory to the general rights of marri-

age, and therefore ought not to be favoured.

The deed of settlement operates as an appointment in favour of her second husband. In cases where such a provision as the present has been made for a wife, the second husband is entitled to it, unless he assent to her retaining it in the same manner as she had it during her first marriage.

In 1 Eq. Ca. Abr. 594. it was held that the second husband was not bound by a settlement made on a former marriage.

The Court must collect from this settlement, that it was the intention of the parties that the husband should possess every thing which was not given up to the wife. The manor of Wrangaton is devised to the wife in the same way as the estate in Torbryan. The parties seem to have understood that unless the estate in Torbryan was settled upon her for her separate use, it would have been subject to the control of her husband: this therefore was secured to her by the deed of settlement; but no notice is therein taken of the manor of Wrangaton.

As the bond recites that it was given in consideration of the real and personal estate which he was to have from his wife; the husband must be considered as a purchaser of every

thing which he did not consent to give up.

With regard to the deed of separate maintenance, the annuity of 451 is expressed to be in lieu of the 10001, before secured by the bond; but neither in that deed is there any mention made of the manor of Wrangaton.

The conclusion therefore is, that what was not settled upon her by any of these deeds was intended to go to the hus-

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Gibbs, in reply.

The devise contains general as well as particular restrictions which will refer not only to the present but to any future subject matter. In answer to the remoteness of the events of the first husband dying, and of her taking a second, it is sufficient to say that at the time of making the codicil, the first was dead. According to the case of Worsley and Craven (a), the will and codicil are to be read as being made at the same time, and incorporated; so that the words "any debts which he should contract" necessarily refer to some future person. Then it follows that the testator meant that the will should exclude some person, which it cannot do unless it relate to some future husband.

The passage in Gilbert speaks only of a deed of confirmation: but this codicil was not to confirm, but only to repub-

lish the will.

Then it was said that the deed of settlement operates as an appointment. But unless it is to be collected that the right was taken away, it still remains. And indeed the parties had

not this estate in their contemplation at the time.

The cases cited do not bear on this question: they only go to shew, that where the wife has the trust of a term, there the husband has the same right as if she had a legal estate. In order to make them applicable here, they should prove that though future husbands were expressly excluded, yet the trust should go to them. But these cases of trusts, created by a husband for the separate use of his wife, are very different from the present case of a devise generally to a woman notwithstanding her coverture.

WILLES, J. This question arises upon the construction of several instruments, the will, the codicil, the bond, and the deeds of settlement and of separation. To take it by steps,

I will first consider what estate Alice Rybot took under the will. That depends on the words of the will, from which the intention of the testator is to be collected. The estate is given to trustees, "In trust to pay the rents and profits "thereof to Alice Fowler, &c. notwithstanding her cover-ture, &c. and not to be paid into her husband's hands." The doubt arises on the words "her husband;" Whether they are restrained to her present, or any future husband. It being left indefinite, the Court must judge of the intention of the testator, which is to be found out by the words accom-

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DBABLE against Dopp.

panying it. And it is made clear by the words which immediately follow, "the same being designed by the testator " for her separate use and benefit, and to be at her own dis-" posal, notwithstanding her coverture." It was manifestly the intention of the testator, that she should have the estate at all times independent of any husband. There was the same devise to the other daughter; and it is material to observe that neither of the husband's names is mentioned. the subsequent words it is evident that he looked to the possibility of her having a second husband; for in the limitations over, it is limited to the issue male of the daughter, remainder to the issue female, without confining it to the issue of that marriage; so that the children of any future marriage were to take under this devise. On the whole of the will, I am of opinion that the testator meant that both his daughters should take the estate independent not only of their present, but of their future husbands.

Then as to the effect of the codicil: that is not making a new will, but republishing the old one. It recites that J. Fowler was dead, and still he confirmed the will, which shews that he intended that Mrs. Fowler should take the estate independent of any future husband: for he suffered the restriction still to remain, that the estate should not be liable to any debts "which her husband had or should contract" after the death of Fowler, her first husband. These latter words there-

fore can only relate to some future husband.

Next as to the bond and settlement: it is contended from the recital of the bond, which was given in consideration of the real and personal estate, that this extends to all estates which she was then, or might be, in possession of. But this does not purport in itself to operate as an appointment of an estate, which she was not in possession of at the time. manifest that Aice Rybot intended to retain every thing she could in her own power, for she conveyed the other estate, of which she then was in possession, to trustees for her sole and separate use. We ought not to extend the words of the deed to a future estate, when there was a present interest to Then it would be a strange construcanswer these words. tion to say that she intended to give her husband an absolute dominion over an estate which was not in the contemplation of the parties at the time.

With

With respect to the first case which was cited: that was the case of a term; this of an inheritance; but the best answer to it is, that that flowed from the bounty of the first husband, and the settlement could therefore only be meant to deprive him of all power over it. But this came from a third person, and was intended by the testator not to be under the control of any future husband.

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Another case cited was where a settlement was made without the privity of the husband; but the answer to that is obvious; that went on the ground of fraud.

ASHHURST, J. Taking this on the construction of the will alone, it is very clear that the testator meant that this restriction should not be confined to the present husband, because he has expressly excluded the husbands of both his daughters from any control over their respective estates; which shews a general jealousy of any husbands, and not any particular jealousy with regard to Fowler alone. And he does not even mention either of their names.

But this intention appears still stronger from the words of the codicil; for having first taken notice of the death of Fow-kr, he then confirmed and ratified all the devises in the will, and still continued the restriction with regard to their husbands. This therefore was as much as if he had said, that "even if there were a doubt upon my meaning before, I now "repeat these words, and mean to extend them to any future husband." So that whatever doubt there might be considering the will alone, it is removed by taking the will and codicil together.

With regard to the bond and settlement, they make no difference in this case. At the time of the execution of those deeds, the estate in question, not being in the possession of the parties, most probably was not in their contemplation.

The consideration of the real and personal estate contained in the bond leaves the question still open, for that only relates to the estate which he had in possession.

I think the husband in this case could not be entitled, unless express words to that effect had been inserted in those instructions.

BULLER, J. Whatever might be the construction upon the will alone, yet taking both the will and the codicil totether, it is clear that this restriction applies to any future

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BEABLE against Dopp.

as well as a present husband. The names of the husbands are not mentioned. The limitation to trustees is during the life of the wife; this therefore must extend to any husband she may ever have.

Whether the codicil is to be considered as a republication of the will, or as an explanation of the testator's former in-

tention, it is equally clear.

It has been compared to the confirmation of a deed, but there is nothing more unlike. In the case of a will, nothing passes till the testator's death. It is only to be considered as speaking from that time. It may be altered whenever the party pleases; and therefore the codicil comes as a republication of every part which it does not alter. As where a man devises all his real estates, and afterwards sells them, and purchases other lands, and then republishes his will, the will must be taken to relate to the after-purchased lands. taking this codicil as a republication of the will, it is impossible to raise a question upon it; for the defendant's counsel are driven to a construction which makes it absurd, by saying that these words can only relate back to Fowler, there being no such person in existence at the time of such republication. The intention of the testator clearly was that his daughter should enjoy the estate free from the control of any hus: and.

Again, taking this codicil as explanatory of the will, it is equally clear, for he took notice in the codicil of the death of John Fowler; now if his intention had only been to have excluded John Fowler personally, the continuance of the restric-

tion was nugatory after his death.

As to the marriage articles, it does not appear that the wife had parted with her interest in the estate in question; it was not in the contemplation of the parties at the time of the marriage. She had only a remainder after an estate tail limited to her sister: it is clear that this remainder was not thought of by them; for the deed specifies by name what estates were meant to pass, but no notice is taken of this remainder. That circumstance is decisive.

Then the articles of separation can as little affect this question, for that deed left every thing just in the same state in which it was before.

Judgment for the plaintiff.

1786.

# CALDWELL and Others against BALL.

Wednesday. May 17th.

TROVER for fifty hogsheads and one hundred and twen- Where sevety tierces of sugar, and thirty puncheons of rum On a motion to set aside the verdict which had been given lading have for the defendant in this cause, and to grant a new trial, been signed Willes, J. before whom this cause was tried at the last Assizes imports, no at Lancaster, made the following report:

The question arises upon two bills of lading, signed by to be had to the defendant who was captain of the ship Tyger, under one the time when they

of which bills of lading the plaintiffs claim.

Thompson, the shipper of the goods in question, was a con-by the capsiderable planter in the island of Jamaica, and corresponded tain; but with Fairbrother, a merchant residing at Liverpool. Previous who first to the 19th of August 1784 Fairbrother had acted as the gene- gets one of ral agent or consignee of Thompson, but from that time his them by a general agency ceased in consequence of a power of attorney legal title to Dorothy Thompson and Bromfield, which superseded his owner or From that time, whatever act was done by Fair-shipper, has brother on behalf of Thompson was by virtue of a special or-a right to der or commission for that specific purpose. in book

The above-mentioned power of attorney to Dorothy, Thomp-where such son and Bromfield authorised them to raise money for the use bills of ladof Thompson, whose affairs were then much involved, and to ing, though different up-make a mortgage upon his estate in Jamaica. It likewise em- on the face powered them to enter into any contract that they should of them, are think fit for consigning and shipping any sugar or produce construc-

made on any of the plantations.

At the time that this power arrived in England, Thompson the captain was indebted to the house of Caldwell and Company, the pre- has acted sent plaintiffs, who were merchants of Liverpool, in the sum bona fide, a delivery acof 4000l. By way of a security for this debt, Dorothy Thomp-cording to son and Bromfield gave the plaintiffs a mortgage dated the such legal 20th of March 1785, for 7000l. upon the plantations in Ja-title will maica, and likewise entered into a covenant for the future con- him from signment of Thompson's sugars to them.

By a subsequent indenture, dated 10th of May 1785, and executed between the same parties, after reciting the abovementioned mortgage, it was declared, "that whereas the Vol. I.

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1786. CALDWELL GRAINS HALL.

" sum of 4000l. or thereabouts, part of the said sum of 7000l. " at the time of the execution of the said indenture was actually "owing by the said T. P. Thompson to the said C. Caldwell " and Company, for which they have the bond of the said " T. P. Thompson and others, and the further sum of 100%. " has been also advanced to the said T. Bromfield, as the at-"torney of the said T. P. Thompson, and the remainder of 4 the said sum of 7000/. was intended to have been so advan-" ced; but doubts having arisen as to the force and validity " of the power of the said T. Bromfield to charge with effect "the said plantation and premises, and it being uncertain " what sum of money the said plantation and premises, are " already mortgaged for, and what other circumstances affect "the same, it has been agreed that the said indentures of " lease and release (meaning the before-mentioned mortgage) " shall be sent out to Jamaica, to the correspondent of the said Charles Caldwell and Thomas Smyth, to be recorded in " the said island, and for information how the said estate is " affected by former incumbrances; and that so soon as the " said plantation, lands and premises, are effectually made, " liable to the payment of the said sum of 7000%, and inter-" est, according to the terms of the said indenture of release, 44 and thusaid Charles Caldwell and Thomas Smuth are well " satisfied that the same are a good and sufficient security " for the said sum of 7000/. and interest, and are also satis-" fied that the said Thomas Pepper Thompson will consign the " produce of the said plantation to the said Charles Caldwell " and Thomas Smyth according to the terms of the said inden. " ture of release, then and not until then, the said Charles " Caldwell and Thomas Smyth are to advance unto the said "Thomas Bromfield, as attorney for the said Thomas Pepper "Thompson, the remainder of the said sum of 7000/.; and in " the mean time no interest for more than is or may be actual-" ly advanced is to be charged or payable. But it is fully un-" derstood amongst the parties, that the said Charles Caldwell " and Thomas Smyth are not to be under any obligation of ad-" vancing any more money than they have done already, un-" til they are fully satisfied with the propriety thereof, and " are content to do so."

At the time this indenture bore date the house of France and Company, merchants at Liverpool, were also creditors of

of Thompson to the amount of \$000% for money advanced to him some time before through the hands of their agents in Jamaica, Messrs. Coppel and Goldwin; and Thompson, to Caldwell, discharge this demand, had drawn two bills of exchange, bearing date the 28th July, 1784, upon Dorothy Thompson and Thomas Bromfield, payable at ninety days sight, in favour of Messrs. Coppel and Goldwin, who indorsed the same to

Extract of a letter from Thompson to Fairbrother, dated the 6th of December, 1784, from Jamaica.

the order of France and Company.

"I have now the pleasure to inform you that I have the most pleasing prospect of a crop, which, avoiding accidents, I hope will enable me to take up those heavy bills when due, which my sister (Dorothy Thompson) will inform you of, and for which I shall ship 200 casks on the Typer, Captain Ball, who expects to sail in all next month."

Extract of a letter from Thompson to Fairbrother, dated Jamaica, 23d January 1785.

"I shall wait upon Messrs. Coppel and Goldwin, to desire them to write to Messrs. France and Company, relative to the bills drawn in their favour. We are making fine sugar, and a large quantity of it. I hope you will make Messrs. Caldwell and Company satisfied, until I have the pleasure of seeing them, which will be soon, as I am, please God, determined to leave this island in all July next in the packet."

Extract of a letter from Thompson to Fairbrother, dated Jamaica, 15th March, 1785.

"I shall have on board the Tyger one hundred and seventy hogsheads and tierces, and thirty puncheons, most of which are already on board. She will sail the beginning of April.

"N. B. With respect to insuring what I shall have on board the Tyger, I shall leave it to your own option. Should she be long on her passage you might get insurance for 2000/: as we could not well bear a loss just now."

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On the same day on which the last mentioned letter from famaica was written to Fairbrother, he, being applied to by CALDWELL Messrs. Caldwell and Company for payment of Thompson's debt, wrote the following answer to them:

" Messrs. Caldwell and Company.

"In consequence of your application to "me for money on account of Mr. Thompson, I am sorry "to inform you that I have nothing wherewith to pay. A "letter from that gentleman acquaints me that he will ship "two hundred casks of sugar and rum on board the Tyger, "Captain Ball. I will be obliged to you if you will order in"surance on these goods.
"Liverpool, 15th March, 1785.

T. Fairbrother."

On the 18th of March 1785, the defendant signed the bills

of lading in question.

One of these bills of lading for the whole cargo, which was acknowledged to have been the first signed by the defendant, was to deliver to Messrs. Thompson and Fairbrother, or their assigns; this was indorsed by Thompson in Jamaica, and sent by him to Fairbrother in England, where it arrived on the 20th of May, enclosed in the following letter:

" Jamaica, 18th March, 1785.

"I send you enclosed a bill of lading for "what goods I have got on board the Tyger. This will ac"quaint you of my being obliged to assign the other bills of la"ding to Coppel and Company for the security of the payment" of the bills drawn in their favour, &c."

A short time after the receipt of this letter, Fairbrother indorsed the bill of lading above mentioned to Messrs. Caldwell and Company, the present plaintiffs; who, after they were in possession of it, advanced two sums amounting together to 219l. 13s. 8d. for the use of Thompson.

The other two bills of lading for different parts of the cargo, making up the whole together, were to deliver to the order of the shipper or his assigns, and indorsed by Thompson
as follows: "Deliver the within to Messrs. Thompson and
"Fairbrother, provided they engage to pay the net proceeds
"to

"to Messrs. France and nephew, otherwise deliver them to "the order of James France nephew on account of Coppell " and Goldwin." againet

CALDWELL

BALL.

These last bills of lading had been delivered into the hands of Coppell and Goldwin by Thompson at the time when he wrote the letter of the 18th of March 1785 to Fairbrother, as appeared by that letter, and were afterwards received by France and Company on the 6th June 1785, in a letter from Messrs. Coppell and Goldwin, dated 16th April.

Captain Ball, the defendant, arrived at Liverpool on the 19th June 1785, having on board his ship the goods in ques-

The day after his arrival the plaintiffs demanded the goods, of him, when he acknowledged the bill of lading, but said that he could not deliver the goods without the consent of the owners of the ship, who were France and Company.

On the next day the plaintiffs saw France, and repeated their demands, tendering at the same time all charges of freight, &c. France said, that neither he nor the Captain would deliver the goods, unless upon a promise that the net proceeds should be paid to him. This was refused by the plaintiffs.

WILLES, J. then observed, that on the trial several points

had been made by the plaintiffs;

1st, That the Captain had no right to retain the goods in question, for that he was liable in an action of trover on the

bill of lading signed by him.

But in answer to it, he had considered this in reality as an action between the plaintiffs and France and Company, and that the defendant who was captain of the ship was merely a trustee for one or the other, and was indemnified in the mean That he was in a similar situation to a sheriff, when contrary demands are made by the assignees of the bankrupt and a creditor claiming under an execution.

2dly, It was insisted that the defendant had done wrong, in refusing to deliver the goods according to the first bill of

lading signed, by which he had bound himself.

As to this point, he had left it to the jury to consider under the particular circumstances in which all the parties stood. He had represented to them that the defendant was master of France and Company's ship, and was charged to deliver the goods to them by Coppell and Goldwin.

That the conduct of Fairbrother was in some degree culpable, in assigning the bill of lading over to the plaintiffs im-

mediately

1786. mediately after he had received it, against what he knew to

be the design of his principal.

CALDWELL And that as the plaintiffs, and France and Company, were against BALL, both fair creditors, and bona fide holders of the bills, he who had first got possession by a legal title ought to be preferred; and that for this purpose the possession of Goppell and Goldwin was to be considered as the possession of France and Company.

3dly, It was objected that France and Company were not creditors of Thompson, because the bills of exchange were not due, and therefore that they had no equitable lien on the

goods.

But that was answered by saying, that the consideration for these bills had actually been advanced by *France* and Company.

4thly, It was insisted that the consignment of these goods was bound by the mortgage to the plaintiffs, executed by

Bromfield under the power of attorney.

This was answered, by saying that the mortgage did not affect this transaction, being subsequent in point of time. That at all events it was only a covenant which bound the eovenantor personally.

Under these directions the jury had given their verdict for

the defendant, of which he had no reason to disapprove.

Scott, Wood, and Law, shewed cause against the rule, and directed their arguments to two grounds, on one of which they supposed that the plaintiffs meant to rely.

1st, That the bill of lading indorsed to them, being actually signed before the other, vested such a property in them,

as enabled them to maintain this action. Or,

2dly, That under the agreement to consign to them in the

mortgage deed, they had a right to these goods.

They observed, that in order to clear this transaction it was necessary to consider the different relations of the parties to each other.

After August 1784, Fairbrother no longer acted as the general agent of Thompson, but under a special direction accompanying each cargo consigned to him; therefore he had no longer the arbitrary disposition of Thompson's property. Bromfield was at that time appointed the general agent. 'The nature of this connexion between Fairbrother and Thompson was perfectly well known to the present plaintiffs. Presions to their getting possession of the first bill of lading, the plaintiffs had taken a mortgage on Thompson's estate for 7000l. for a debt of 4000l. only.

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At this time France and Company were also creditors of Thompson, upon bills of exchange drawn by him to the amount of 3000% for money which had been advanced to him CALDWELL through the hands of Coppell and Goldwin, who were agents of France and Company. Under these circumstances the bills of lading were signed, Thempson intending that Fairbrother should apply these goods in discharge of the bills of exchange which were in the possession of France and Company. But the plaintiffs contend that the bill of lading which consigned the goods to Fairbrother having been actually first signed by the defendant, and Fairbrother having afterwards indorsed it over to them, the defendant is concluded by his own act. In answer to this, they observed that Fairbrother being merely the agent of Thompson for a specific purpose, and not having a general power over the consignment, which was known to the defendant, it was nothing more than an undertaking by him to deliver the goods to Fairbrother for the purpose of being disposed of according to directions from Thompson, and therefore, as between Thompson and Fairbrother, under whom the plaintiffs claim, Fairbrother had indorsed this bill of lading over to the plaintiffs without any authority, and against conscience; and there being a general communication between Fuirbrother and the plaintiffs, that they either had or might have had notice, unless they were guilty of great negligence, that these goods were orginally devoted to take up the bills which were in the possession of France and Company.

But even supposing that any stress is to be laid upon the plaintiff's bill of lading having been the first actually signed, yet that will have no weight under these circumstances; for, according to the nature of Fairbrother's authority, if Thompson had merely sent him a letter, ordering him to deliver the net proceeds of the goods to France and Company, that would have been sufficient. Then there is no good ground to represent these bills of lading as inconsistent, for the second bill of lading amounted to no more than a special appropriation of the goods which were to be delivered to Fairbrother under the first bill of lading, and came in lieu of a letter, or other specific order from Thompson. The defendant therefore, being apprized of the mode of dealing between Fairbrother and Thompson, only bound himself to deliver the property to Fairbrother, as the special agent of Thompson, and Fairbrother was afterwards to deliver the net proceeds ac-

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cording to further directions from Thompson, which were contained in the second bill of lading. The defendant there-CALDWELL fore has complied with his duty, for the goods were offered to be delivered to the plaintiffs, provided they would promise

to pay the net proceeds to France and Company.

It is not contended that any money was advanced by the plaintiffs at the time of assigning over the bill of lading to them: but it is said that two small sums were afterwards advanced by them on the credit of the bill of lading; but it is much to be doubted whether the money was advanced on that account; for the plaintiffs had at that time a large mortgage on Thompson's estate, which was more than sufficient to cover their debt. And indeed the sums advanced were so small that they could only be colourable, for they must have known that they were not sufficient to answer the pressing demands of Thompson. Besides, if the fact were so, it was done at their own peril under notice of Fairbrother's limited authority; for before that time they had treated with Bromfield as the general agent of Thompson.

Fairbrother was during all this transaction in the habit of communicating his letters to the plaintiffs. In the letter dated 6th December 1784, Thompson took notice that he had heavy bills outstanding against him, for the payment of which he should ship 200 hogsheads on board the Tyger, Captain It was clear therefore from that letter, which the jury had a right to presume that the plaintiffs had seen, that the goods in question were sent to Fairbrother to take up those bills which were in the possession of France and Company, for there were no other heavy bills except those. The plaintiffs must have known therefore that there was a special lien meant to be fixed on this property; and the letter of the 23d January confirmed it, because it shewed that Thompson held the same intention that he had manifested in the former letter; and is also very important, because it proves negatively, not only that Thompson had no idea of sending the goods to the plaintiffs, but that he had also expressly intended to exclude them, for he desired Fairbrother to call upon them and make them satisfied till he came to England.

No argument in favour of the plaintiffs can be drawn from the circumstance of their having insured this cargo by the direction of Fairbrother, he himself having no authority from Thompson to order any such insurance till the receipt of the letter of the 15th Murch, which was long afterwards; and

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it was gross negligence in the plaintiffs, knowing Fairbrother's limited commission, not to demand a sight of his authority

for making such an order.

It was therefore for the jury to determine under all these circumstances whether the plaintiffs had or had not actual potice that these goods were consigned to Fairbrother for the special purpose of paying the bills in the hands of France and Company; and the verdict has determined that they had.

Hitherto this case has only been considered on the presumption of fraud or wilful negligence on the part of the plaintiffs. But in point of law this property was vested in France and Company before the plaintiffs were in possession of their bill of lading. All the bills of lading had an existence when the letter of the 18th March was written. Thompson had then put the second bill of lading into the hands of Cappel and Goldwin for the use of France and Company. The first bill of lading was at that time, and for long afterwards, in abeyance, it not having reached Fairbrother. Therefore not only the right of property was vested in France and Company in point of law, but they were also in possession in point of fact, for the goods were actually on board a ship belonging to them.

At all events the agent could do no more than the principal. Had *Thompson* himself been in *England*, he could not have delivered this cargo to the plaintiffs after *Coppel* and *Goldwin* had been put in possession of the bill of lading.

2dly, As to the mortgage, allowing it to have been warranted by the power of attorney, it could make no difference in this case as between the plaintiffs and France and Company; for the covenant to consign the produce of Thompson's estate could only be binding upon him, and could not affect France and Company, who were in possession under a legal title in the mean time. But this mortgage was not executed pursuant to the power of attorney. The power was expressly given in order to raise money for Thompson, and not for the purpose of securing an old debt.

Wilson, Chambre, and S. Heywood, contra, contended that as the plaintiffs were in possession of the first bill of lading, which was signed by the defendant, it was conclusive as against him. A bill of lading is as negotiable as a bill of exchange. It is an undertaking by the captain to deliver the goods specified therein either to the consignee, or to his assigns. The defendant therefore, having signed one bill of

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lading, acted fraudulently in signing another which was inconsistent with the first. But in every case where there are Calbwell two inconsistent bills of lading, the first binds the captain and owners. If the other bills of lading had been of the same tenor and date as the first, Coppell and Goldwin could have derived no title under them, because in order to negotiate them they ought to have been indorsed by Fairbrother as well as Thompson.

Admitting that the defendant is to be considered as a trustee, yet he is a trustee for those persons to whose order he himself signed the bills of lading, and if, after having signed one, he entered into a subsequent contract inconsistent with such trust, he is guilty of a breach thereof, for which he is personally answerable. He is not in a similar situation to a sheriff, who knows not whom to prefer of two contending parties, to whose several claims he is not privy, and who therefore comes to the court for an indemnity, or seeks it from the parties; for here these contradictory claims are set up in consequence of the defendant's own wrong, and could not have happened without. The defendant therefore has made himself liable.

But even considering this merely as a question of right between the plaintiffs and France and Company, the plaintiffs' title ought to be preferred, because they derive it under the first bill of lading.

WILLES, J gave no further opinion, but declared himself satisfied with the verdict.

ASHHURST, J. I do not think upon the whole of this transaction that this can be considered as a verdict either against evidence or law, and therefore there ought not to be a new trial.

There is no reason for saying that either the plaintiffs or France and Company are not equitable holders of the several bills of lading. When equity is equal between the parties, a legal title must prevail. This reduces the question to a mere point of law. I shall put out of the question all the letters, which ought not to prejudice the plaintiffs because they were not proved to have had actual notice of them; neither are they guilty of negligence in not having endeavoured to learn their contents. They knew that Fairbrother acted as the agent of Thompson, and had no reason to be suspicious of his authority.

Upon the merits of the case, the leaning of my inclination would rather be in favour of the defendant, whom I consider consider as the servant of France and Company, than in fa**vour** of the plaintiffs, because they have got another security.

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But in point of law also the plaintiffs are not entitled to CALDWELL Three bills of lading were signed by the captain: the first is a general one, consigning the whole cargo to the order of Thompson and Fairbrother; the other two are partial consignments of different parts of the same cargo to the order of the shipper. If it could be proved, or there was any reason to infer that the defendant meditated a fraud on any person, that would afford an argument as against him; but no fraud can be presumed here.

I do not see indeed the reason of making these bills of lading in a different form, but the captain might suppose them to be the same in effect; for he knew that Fairbrother was merely an agent for Thompson. Therefore I do not think that they can be said to be inconsistent; they are all of them in substance to the order of the shipper. Whoever then was first in possession of either of these bills of lading had the le-

gal title vested in him.

It appeared by the letter of the 18th of March, that at that time Thompson had indorsed two of the bills of lading to the agents of France and Company. In my opinion, that was an immediate transfer of the legal interest in the cargo, and that same letter, which also conveyed the other bill of lading to

Fairbrother, gave him notice of this indorsement.

It was argued that the defendant was bound to deliver the cargo according to his undertaking; but, as he knew of this indorsement to Coppell and Goldwin, he considered himself bound to deliver the cargo according to that bill of lading, which was first possessed by one of the parties. He then concluded that he should fulfil his undertaking by delivering to the order of the shipper. As to the plaintiffs being in possession of the bill of lading under which they claim, before the other two arrived in England, the time of their arrival cannot vary the case, for the legal title was vested in Coppell and Goldwin, by their being indorsed to them.

BULLER, J. Several objections have been made to this verdict; but the case is confined to a very narrow compass.

The first objection was, that the defendant had no right to withhold the goods after demand made by the holder of the bill of lading. The answer given to it was, that he was indemnified, and that it ought to be considered as an action between

between the plaintiffs and France and Company. But I do not think that the doctrine of indemnity applies to such cases as CALDWELL these. Besides, it always applies against a defendant and not for him. If it appear that a defendant stands in the place of a third person, he shall not be permitted to avail himself of any objection against the merits of the case, which such third person could not have availed himself of.

The 2d objection was, that, as there were different bills of lading, the defendant was bound to deliver the cargo according

to the first bill of lading actually signed.

This being the real point of the case, I shall reserve it, till

last.

3d Objection. That as the plaintiffs and France and Company were bona fide holders of these bills of lading, they who first got possession, as between these parties, were to be preferred.

But bare possession conveys no title, as between persons claiming under different rights. The question here is, who has the legal title? For the person who first gets possession

under the legal title must prevail.

4thly. That France and Company were not creditors to Thompson at the time that the bills were indorsed to them. But that is not so. For they stood in the situation of payees of the bills of exchange, for which they had given a valuable consideration.

The last objection was, that the plaintiffs were entitled under the covenant contained in the mortgage to consign to them. The answer given to that was right; that the mortgage had nothing to do with this question. It was subsequent to the transaction; and besides it was only a covenant to consign.

which could not bind third persons.

Now as to the principal point, it is material to consider the nature of a bill of lading. It is an acknowledgment under the hand of the captain, that he has received such goods, which he undertakes to deliver to the person named in that bill of lading. It is assignable in its nature; and by indorsement the property is vested in the assignee. It is now clearly settled that goods at sea may be so assigned. This doctrine is laid down in Evans and Marlett, 1 Lord Ray. 271. and is recognized by Lord Mansfield, in Wright and Another v. Campbell and Another. 4 Burr. 2051.

It is argued that the captain must be answerable at all events in this action, because he signed the first bill of lading

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to the order of Thompson and Fairbrother, who indorsed it to the plaintiffs. I think it very material to consider who Fairbrother was. He had no interest in these goods; and he was CALDWELL known to all the parties to be the agent of Thompson. Then Fairbrother must be considered as Thompson himself. The bills of lading were all to the order of Thompson; he had then the absolute control over the goods; and might have unshipped them if he had so pleased. So that they are not like goods consigned to a third person, for they remained under the power of Thompson all the time till he indorsed the bills of lading. If Thompson and Fairbrother are to be considered as the same person, it is the same as if the bills of lading were to the order of Thompson alone. Then the question is, who has the prior right under him?

It was said by the plaintiffs' counsel, that the defendant was the agent of France and Company, and that they must be taken to know what he did; but that makes against the plaintiffs; for at the time when Thompson assigned the two bills of lading to Coppell and Goldwin, the defendant knew that he had the other in his hands, and could not therefore have assigned it to any other person. The defendant then acted fairly, and it could only happen by the subsequent misconduct of Thompson, namely, by his afterwards indorsing one of the bills of lading to another party, that any difficulty

could arise.

Then the question is, whether this bill of lading, being made in favour of Thompson and Fairbrother jointly, can be distinguished from one made in favour of Thompson only? I think it cannot, because Fairbrother was known to the parties

to be the agent of Thompson.

As therefore this transaction is to be considered in the same light as if all the bills of lading had been made to the order of Thompson alone, how does the question stand as between the plaintiffs and France and Company? Both parties claim under Thompson: but France and Company have the first legal right; for two bills of lading were first indorsed to them, and the letter which conveyed the other bill of lading to Fairbrother apprized him at the same time of this indorsement.

(a) Rule discharged.

<sup>(</sup>a) Vide poet. Hibbert v. Carter, 745. and Lickbarrow v. Mason, 2 vol. 63.

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Wednesday. May 17th.

The KING against The Inhabitants of ST. PETER in the Borough of DERBY.

A second certificate to a pauper former one

TWO justices made an order for the removal of Benjamin Pratt, Mary his wife, and their four children, from the parish of St. Peter in the borough of Derby to the parish discharges a of Chaddesden in the county of Derby; and the sessions, on given by the appeal, quashed that order; and stated the following case for same parish, the opinion of this court.

Benjamin Pratt the pauper, on the 5th of November 1751, was bound apprentice for seven years to Joseph Pinn, in the parish of All Saints in Derby, to which place Pinn had a certificate from the parish of Smalley. The pauper served his master in All Saints about five years and an half. And the master with his family, at Lady Day 1757, removed to Chaddesden, where he resided till the 14th of January 1758, when Smalley granted Pinn a certificate. Between Ludy Day 1757, and the 14th January 1758, the pauper served his master upwards of forty days in Chuddesden. Pinn the master never returned to All Saints, but continued at Chaddesden under the certificate. The pauper returned to All Saints in the Summer 1758, and served his master there upwards of forty days after Smalley had granted the certificate to Chaddesden. The sessions were of opinion that the pauper gained a settlement by such last service in All Saints.

The only question was, whether the second certificate to the parish of Chaddesden discharged the former one to the parish of All Saints, they having both been given by the pa-

rish of Smalley?

The Court, being of opinion that this question was determined by the case of the King against The Inhabitants of Birdham (a), discharged the rule, without hearing any argument.

Mingay in support of the rule-Coke against it. Order of sessions affirmed.

(a) Hil. 25 Geo. 3. B R.

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# The KING against The Dock Company of HULL.

Wedsteaday. May 17th.

TWO justices allowed a rate made for the relief of the Lands purpoor of the parish of Sculcoates, in the East Riding of chased by a the county of York. company, Upon appeal, the sessions confirmed the said rate, and ed into a and convert-

dock, ac-

stated the following case;

That in pursuance of an act of parliament made in the cording to 19th year of his present Majesty, entitled "An act for mak-an act of parliament, "ing and establishing public quays or wharfs at Kingston which de-" upon Hull, for the better securing his Majesty's revenues clares that of customs, and for the benefit of commerce in the port the shares of of Kingston upon Hull, for making a bason or dock, tors shall be with reservoirs, sluices, roads, and other works, for the considered 44 accommodation of vessels using the said port, and for ap-as personal " propriating certain lands belonging to his Majesty, and property, "tor applying certain sums of money out of his Majesty's to the poor "customs at the said port for those purposes, and for esta-in propor-"blishing other necessary regulations within the town and tion to the " port of Kingston upon Hull," The commissioners in and annual proby the said act appointed did, before the making of the said dock or bason, purchase divers lands and grounds in the said parish of Sculcoates, all which lands, as well before the purchase thereof as afterwards, were assessed to, and did pay, the land-tax and all parochial assessments to the parish of Sculcoates in comm n with all the other lands in that parish; and that the said Dock Company did cut and convert three acres, two roods, and twenty-nine perches of land, part of the said lands so purchased as aforesaid, and lying within the parish of Sculcoates aforesaid, into the said dock or bason. that the same are now part thereof, the whole dock or bason containing ten acres.

That in that part of the said dock or bason within the parish of Sculcoates, twenty or thirty ships or vessels, or thereabouts, frequently lie and are moored for several months together, particularly in the winter season; and that the apprentices belonging to such ships usually lie on board such ships or vessels during all the time they are so stationed.

That in the year 1783, the said Dock Company received for tonnage of ships granted by the said act 5000/. and expended

1786. pended in officers' salaries and requisite repairs 1300l so that

the net proceeds amounted to 3700/.

The Kind That the said Dock Company do not owe or stand indebted against to any person or persons in any sum of money or security at Company of interest, either borrowed under the authority of the said act, Hull. or otherwise.

That there are 120 dock shares in this company of 500/. each, on which the several proprietors have only actually advanced and paid 300/. for each share, and that the same now sell at 525/.

That on the 7th day of May 1784, an assessment was laid on the lands and tenements in the said parish of Sculcoates for the relief of the poor therein for the year 1784, at one shilling and four pence in the pound, which rate was afterwards duly allowed by two of his Majesty's justices in and for the said Riding, and published in the parish church of Sculcoates, according to the statute in that behalf made, and is in the words following;

" For that part of the Dock lying in the parish of Sculcoates,

800l.—59l. 6s. 8d."

Bearcroft and Wilson, shewed cause against a rule which had been obtained last term to quash this order of sessions,

confirming the rate.

It appears by the order of sessions that the land purchased by the Dock Company was assessed to the land-tax, and paid all parochial assessments to the parish of Sculcoates, as well before as after the purchase. This is therefore only land, which by improvements, produces more than it did before; and the improved value can afford no reason why it should cease to be assessed. The rate has been encreased in proportion to the improved value of the land. This is not like the case of a toll or lighthouse, which before was not rateable at all. If it be objected that this property is rated as land, when the act has made it personal property; the answer is, that the Legislature in this consulted only the convenience of the owners of shares, and did not mean to alter the nature of the property, so as to exempt it from the payment of rates and taxes, to which it was liable before; but merely to subject it to the same easy rules of alienation as chattels. is therefore like a chattel interest in land, which is indisputably rateable.

Erskine, and Garrow, contra, did not contend that personal property generally was not rateable: but it did not

follow

follow that this species of personal property fell within the principle of those cases that determined that such sort of property was rateable. It was the intention of the legislature The Kino that this property should be exempted from all rates and taxes; against The Dock for the proprietors were engaged in a very hazardous under-Company of taking for the benefit of the public, the profits of which were Hull. very precarious.

In the case of the King v. Richardson (a), lead mines were determined not to be rateable property on account of the great hazard and expence with which those kind of adventures are generally attended; though one reason given in that case was, that lead mines were not mentioned in the 43 Eliz. c. 2. but coal mines were; and it was said, that the insertion of one

was an exclusion of the other.

In Rowls v. Gells and another (b) the Court held the lessee of lead mines in such case liable. They therefore distinguished between him and the original adventurers; for though his revenue was uncertain, he run no risk, and was not to be ranked with that class of adventurers.

In the case of the London waterworks (c) the Court doubted whether the profits of an hazardous adventure, which required in the first instance a great capital, and were subject to continual losses, wete rateable. But the case went to the Exchequer Chamber, where judgment was given on another ground.

Another objection arises on the rate itself; it professes to be a rate on lands and tenements, and yet it is rated as the

profits of an adventure.

Besides, the act has expressly exempted the company from the rate now attempted to be imposed, by declaring that the shares of the proprietors shall be considered as personal pro-

perty.

Per Curiam. This is landed property lying within the parish, which clearly was the subject of a rate before the passing of this act of parliament. Then the question is, whether the act exempts this property, which was rateable and rated before. But there are no words of exemption. As between the heir and executor, this is to be considered as personal property: but the Legislature did not intend to alter the nature of it in any other respect.

Rate and order of sessions affirmed (d).

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(a) 3 Burr. 1341. (b) Crop. 451. (c) Galdec. 155, 6. (d) Vid R v. the Mayor, &c. of London, post. 4 vol. 21; & R. v. The Commissioners of Sasters Load State Navigation, ib. 730.

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Wednesday, May 17th.

# The KING against EDWARD TRELAWNEY.

Conviction under 22 Geo 3. c. 47. for insuring a ticket in the lottery, authorized by 25 Geo. 3. quashed.

HIS was a conviction before two justices of the peace

on the lottery act of 22 Geo. 3. c. 47.

'The information stated " that the defendant, on the 18th of " March 1786, not regarding the statutes of our said lord the "king, nor fearing the penalties therein contained, did in the " parish of St. Betolph without Aldgate, in the ward of Aldgate, " in the city of London, receive of and from one James Thobecause the " mas the sum of five shillings and threepence of lawful money information " of Great Britain, under pretence, promise, and agreement, to did not state " pay to the said James Thomas one sixteenth part or share toat it was a restricted in the "of 20 guineas, to wit, the sum of one pound six shillings and State lottery." threepence, of lawful money of Great Britain, on the event " and contingency that the ticket No. 37107, should be drawn " fortunate on the 37th day of the drawing of the lottery, autho-" rized and established by an act of parliament made in the par-"liament of our said lord the king at a Sessions thereof holden " at Westminster in the 25th year of his reign, entitled " An " act for granting to his majesty a certain sum of money to " be raised by a lottery," contrary to the form of the statute " in such case made and provided; whereby and by force of "the statute in such case made and provided the said Ed-" ward Trelawney hath for his said offence forfeited the sum " of 501. &c.

After stating that the defendant had been summoned, and pleaded not guilty, the conviction proceeded to state that "on the 22d day of March, in the 26th year, &c. the said " James Thomas (a credible witness, &c.) saith, that he "knows the said Edward Trelawney; and that on Saturday "the 18th day of March he went to the office of the said " Edward Trelawney in the parish of St. Botolph without " Aldgate, in the ward of Aldgate aforesaid, in the said city, "to enquire the price of insurance for a sixteenth part of " 20 gu ineas prize only, and was informed by the said Edward " Trelawney that the price was five shillings and threepence; " he then, requested the said Edward Trelawney to insure him " the ticl et No. 37107, and that the said Edward Trelawney " ordere d him to go to a clerk in the office, who accordingly in-" sured him the said ticket No. 37107, for which be paid to him wthe

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against

" the said sum of five shillings and threepence; and in con-" sideration thereof the said clerk of the said Edward Trelaw-" ney did promise and agree to pay to him the said James Tho- The Ki e " mas one sixteenth part of 20 guineas, if the said ticket No. "37107, should be drawn a prize on the 37th day of the draw-" ing of the said lottery."

It then stated that, the defendant not contradicting this evidence, the justices convicted him in the penalty of 50% for his

said offence.

The statute, establishing the State lottery in which the ticket in question was sold, is the 25 Geo. 3. c. 59; but the penalty is given under the former general statute, 22 Geo. 3. 3. c. 47; the 13th section of which enacts that, "in order "to prevent all adventuring with lottery tickets in any such " (a) lottery as aforesaid, it shall not be lawful for any person " or persons to sell the chance or chances of any ticket or "tickets in any such lottery as aforesaid for a day or any less. " time than the whole time of drawing in any such lottery, 66 or to insure for or against the drawing of any such ticket " or tickets, or to receive any money or goods in consideration of, " any agreement to repay any sum or sums, or to deliver the same " or other goods, if any such ticket or tickets shall prove fortunate "or unfortunate, or on any other chance or event, relative "to the drawing of any such ticket or tickets, whether "as to their being drawn fortunate or unfortunate, or the "time of their being drawn or otherwise howsoever, or una der any pretence, device, form, denomination or descrip-"tion whatsoever, to promise or agree to pay any sum or " sums, or to deliver any goods, or to do or forbear doing any " thing for the benefit of any person or persons, whether with " or without consideration, on any event or contingency re-" lative or applicable to the drawing of any such ticket or 4 tickets, or to publish any proposal for any of the purposes " aforesaid, &c. under the penalty of 50/."

Erskine took four objections to this conviction.

1st, The information does not distinctly and specifically charge the defendant with an offence within the act. does not charge him with receiving money or goods in consideration

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<sup>(</sup>a) Such lottery refers to any State lottery, which may at any time be authorrized by act of parliament.

deration of any agreement to repay any sum, or to deliver the same, or other goods on the event of the ticket's proving furtuate against under pretence, promise, and agreement to pay; whereas the offence constituted by the act is receiving money in consideration of the agreement.

2d Objection. It does not appear that the ticket in question was a ticket in the State lottery. The information should have alleged that the ticket was a ticket in the State lottery, established by act of parliament. Whereas the only mention that is made of the State lottery relates to the time of

drawing the ticket.

3d Objection. There is no such act of parliament as that stated on the record. The court are bound to take notice of the caption of a statute, as well as of the body of it. This appears on the record to be an act made in a parliament held before our lord the king, at a sessions thereof holden at Westminster, in the 25th year, &c. Whereas the statute in question passed at a parliament begun and holden in the 24th year, &c. and so continued to the 25th, &c.

In Rann and Green (a) the 4th and 5th Ph. and M. was described to be an act of the 4th Ph. and M. which was held to

be fatal.

4th Objection. The information charges that the defendant committed the offence in person: but the evidence shews that the offence, if any, was committed by his clerk. The Court will not conclude that the clerk is an agent for an illegal purpose, and there is no evidence to connect them.

Sylvester, contra, was proceeding to support the conviction;

but was stopped by

The Court, who said, that the second objection must be fatal. That the only mention of the lottery in the information was relative to the time of drawing the ticket, without stating that the ticket on which the insurance was made, was a ticket in the State lottery.

On the second objection therefore the

Conviction was quashed.

(a) Gowp. 474.

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Wednesday, May 17ths.

#### ALEXANDER against OWEN.

CASE for goods sold and delivered. Pleas the general Where issue, and a set-off. The cause was tried at the last As-goods are sizes at *lancaster* before *Willes* Justice, when the plaintiff was delivered mon-suited.

On a motion to set aside the nonsuit, it appeared that the to take a plaintiff had bargained to sell to the defendant who lived at specific par-Manchester a quantity of tobacco, the value of which, in ad-cel of copper money in dition to a former debt of 231, for some other tobacco, payment, a amounted to 50%. It was agreed at the same time between delivery of the parties that the plaintiff should take in payment of that such copper debt a quantity of copper halfpence, which were made up in good bar to crown papers, in each of which was no more than five penny-anaction for worth of good halfpence; and it was also agreed that, if the the value of amount of the copper should exceed the value of the tobacco, though in some more of the latter should be sent to balance the amount. fact it was Part of the tobacco was delivered, but the plaintiff refused to counterfeit send the remainder unless the defendant would pay for the money. An whole in good money. Several sumples of this conver were illegal conwhole in good money. Several samples of this copper were tract, if reshewn to the plaintiff at the time of the agreement, who said scinded as to it would pass very well at Liverpool, where he lived. The part, must copper was accordingly sent to the plaintiff on the 19th of be rescinded July; and on the 30th of August the defendant wrote a letter to the plaintiff, refusing to take it back, in answer to a letter of his of the 28th of the same month, complaining of the badness of it, and refusing to accept it. It also appeared that before the writing of this letter the parties had corresponded on the subject: but the copper was not actually returned till

The question was, whether the delivery of the copper was a good payment. If so, there was more than enough to balance the plaintiff's demand.

November.

Bolton, Serjeant, against the rule, insisted that this was not a contract for the purpose of uttering bad money, which would have been illegal, and therefore void under the stat. 15 Geo. 2. c. 28. but it was an agreement by the plaintiff to take a specific parcel of copper, which was valid and legal. But supposing it otherwise, the plaintiff was equally culpable with the defendant; and as it appeared that he had seen the identical

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identical copper at the time of entering into the agreement, he ought not to be permitted to object to it now as an illegal contract.

Scott and Heywood, contra, contended that this agreement was void, because it was an agreement to commit an offence; and therefore the defendant could not protect himself under it, for independently of the statute of the 15 Geo. 2. it was a misdemeanor to utter counterfeit money knowing it to be such.

But supposing the plaintiff would have been bound by the agreement, if it had been concluded, yet it was only executory, for the plaintiff sent word that he would not take the copper money as payment; and he kept back part of the tobacco which had been agreed for. If an action had been brought by the defendant to compel the delivery of the rest of the tobacco, he could not have recovered, because there was no legal consideration: and if the defendant had never sent this copper in payment, the plaintiff could not have compelled him to perform the contract, which would have subjected him to a criminal process. I hen he ought not to be permitted to take advantage of it in this shape.

The question should have been left to the jury, to determine the extent of the agreement: and at least the plaintiff was entitled to recover that part of his debt which accrued previous to this contract. It has been settled that if a contract be valid as to part, and void as to the rest, the plaintiff may recover upon that part of it which is legal. Kobinson v. Bland,

2 Burr. 1077.

WILLES, J. declared himself satisfied with the nonsuit.

Ashhurst, J. The nonsuit in this case ought to stand; for it does not appear that the parties entered into this contract, knowing it to be illegal: but even if it were so, it does

not lie in the plaintiff's mouth to take advantage of it.

BULLER, J. It has been objected that this is an illegal contract: there is no doubt but that an agreement to take counterfeit money, knowing it to be so, is void; but the fact does not come up to it in this case. The plaintiff did not agree to take counterfeit money in payment; but the agreement was to take such copper money as was then shewn to him.

Supposing however that this contract was illegal, the plaintiff would not stand in a better situation. He could never recover; for the argument of the plaintiff's counsel, in case an action had been brought by the defendant to recover the remainder of the tobacco, would have been equally applicable

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plicable to the plaintiff. It cannot be said that the sale is good, and that the payment is bad; if it be an illegal contract, it is equally bad for the whole. It would be great ALEXANinjustice to allow the plaintiff to recover in this action the whole value of the goods sold, because that would be permitting him to take advantage of a corrupt agreement, which is never allowed in cases where a party applies to the court to set aside such agreements. That was the principle on which the Court went in a late case of Fitzroy and Gwillim (a), where they said, that, if a party applies to the Court to rescind a contract on the ground of its illegality, it must be done in toto, and he must not derive any advantage under it. The parties are in pari delicto, and if one of them seek relief, he must first do what is just; according to the principle established on the other side of the Hall, that he who asks equity must do equity.

This nonsuit will not preclude the plaintiff from recovering the 231. which was owing upon a former agreement, because that debt arose from a fair and valid transaction: but that is no reason for setting aside the nonsuit in this case.

Rule discharged.

(a) Ante, 154.

# TOPPING against RYAN.

Friday,

YOWPER shewed cause against a rule why the commit-Plaintiff ment of the defendant to the custody of the marshal must give notice of his should not be set aside for irregularity (b).

Judgment having been obtained against the defendant doned a for-(which was affirmed on a writ of error), execution was sued mer commitout for 6061, which was 51. more than was really due; and for erroneous, this irregularity a rule was made in last Hilary term, to shew before he encause why the defendant should not be discharged, which was ters a second, afterwards made absolute. Pending this rule, the defendant rectifying was charged in custody for the real debt, upon which this setond rule to shew cause was obtained.

It was now contended on behalf of the plaintiff, that immediately on the application having been made to the Court in the last term, and the irregularity having been discovered, the plaintiff had abandoned the former commitment, and charged the defendant in execution for the sum actually due.

And

(b) There was another part of the rule calling on the plaintiff's attorney to pay the costs of this application, which was discharged on the merita.

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May 19th

having aban-

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And that when the Court set aside the former execution, they made no order about the second, although the defendant had actually been charged with it at that time.

Mingay in support of the rule now insisted, that the former execution was not abandoned when the first rule was made absolute: before which time the defendant was charged in custody with a second execution, which was irregular. That when the first rule was made absolute, the Court only decided on the former execution; and the subject matter of the present motion not being then before the Court, they gave no directions relative to the second commitment.

Per Curiam. There is no affidavit that the plaintiff had given notice that the first commitment was abandoned pending the former rule; and a second commitment for the same cause, before the first was discharged, is clearly informal.

Rule absolute (a).

(a) Vide poet. 273.

Saturday, May 20th.

#### The KING against SHARPNESS.

When a de- TIE defendant, who was keeper of the prison at St. Albans, having been convicted of suffering a prisoner to fendant who has been escape, was now brought up to receive judgment.

Pulmer for the prosecution offered to read an affidavit in an indictment, comes aggravation, which was made by a witness who had been ex-

up to receive amined at the trial.

judgment, Garrow for the defendant objected, that it would be a very the prosecutor may read dangerous practice if such affidavits were permitted to be read, affidavits in made by witnesses who had been examined at the trial, and aggravation who had then an opportunity of disclosing whatever they by witnesses knew. That such a practice would bear particularly hard upon the defendant, who could have no opportunity of crossexamined at examining the witness, or of answering the facts now sworn the trial, to, which might be kept back through collusion. which affi-

WILLES, J. and ASHHURST, J. doubted at first what the davits the defendant is practice was. They had understood it to be, that it was unat moerty to necessary for the defendant to offer any evidence in extenuaanswer. tion at the trial, because such matter might be brought before the court afterwards by affidavit: but they had always been of opinion that the prosecutor must prove his whole case at the trial, and could not afterwards go into matter of aggrava-Particularly that no such affidavit could be made by a

witness who had been examined at the trial. But

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2 E 55/

Buller, J. said the practice had always been otherwise. At the trial, the only thing to be enquired into is the fact which constitutes the offence. Matters of extenuation or The King aggravation are never entered into at that time. If it were permitted to the prosecutor to enter into matters of aggravation, it would be highly unjust not to let the defendant rebut it, by offering evidence in extenuation. It is not to be disputed, that a different witness, whose testimony goes only to matter of aggravation, must come before the court by affidavit, and would not be received at the trial. The same reason extends equally to the same witness: for if it be unnecessary and improper for another witness to go into matter of aggravation, it is also improper for the same witness. If ideed these affidavits contain matter of such aggravation as would induce the Court to inflict a heavier punishment, then the defendant ought to have an opportunity of answering

Upon recollection, most of the cases which have come before the Court from the Sittings have been indictments on assaults; there the witnesses have, in general, been examined on the part of the prosecutor alone, and have only been permitted at the trial to give evidence of the fact to convict the defendant, and the prosecutor has constantly afterwards been permitted to read affidavits of other collateral matters

The rest of the Court now coinciding in this opinion, the and leave was given to the defendant to answer it; which he did on a subsequent day. After which the Court passed judgment on the defendant,

that he should be imprisoned for one month (a).

in aggravation.

(a) Vide post. 2 vol. 68S. R. v. Bunts.

# RUBERY against JERVOISE and Another.

Tuesday, May 23d.

HIS was an action of covenant. The declaration stated, that on the 3d March, 1725, covenant in by a certain indenture tripartite, made between Walter Baynes a lease for and 61 years, That at

" any time willia one year after the expiration of 20 years of the said term of 61 years, upon the sequent of the lessee, and his paying 6/. to the lessors, they would execute another lease \* of the said premises unto the lessee, for and during the further term of 20 years, to com-"same from and after the expiration of the said term of 61 years, &c. and so in like manner at the end and expiration of every 20 years during the said term of 61 years, for the like "consideration, and upon the like request, would execute another lease for the further term "If 20 years, so commence at and from the expiration of the term then last before gramed, &c." Under this covenant the lessee cannot claim a further term of 20 years, at the expiration of the last term of 20 years in the lease, if he has omitted to claim a further term at the end of the first and second 20 years in the lease.

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and Robert Warner of the first part, William Wilton of the second part, and Richard Grimes and John Pankeman of the third part; after reciting as therein is recited, they the said Walter Baunes, and Robert Warner, by and with the direction and appointment of Richard Grimes and J. Pankeman. did, and each of them did, demise, lease, and to farm let, unto the said William Wilton, his executors, administrators, and assigns, all that piece or parcel of ground, &c. [particularly describing it] from the feast of St. John the Baptist, then last past, for sixty-one years; yielding and paying therefore unto the said Walter Baynes and Robert Warner, their heirs and assigns, for the first two years of the said term, the rent of one pepper-corn; and yielding and paying therefore yearly and every year, during the remainder of the said term of 61 years, unto the said Walter Baynes and Robert Warner, their heirs and assigns, (as tenants in common,) the yearly rent or sum of 2l. 7s. 6d. at the two most usual Feasts, &c. without any deduction, &c. the first half-yearly payment thereof to begin at Christmas 1727. And the said Walter Baynes and Robert Warner for themselves respectively, and for their respective heirs and assigns, (as tenants in common,) did, and each of them did, covenant, promise, grant, and agree, to and with the said William Wilton, his executors, administrators, and assigns, and to and with every of them, by the said indenture, that, at any time, within one year after the expiration of 20 years of the said term of 61 years thereby granted, at and upon the request, proper costs and charges of him the said William Wilton, his executors, administrators, and assigns, and his or their paying unto the said Walter Baynes and Robert Warner, their heirs or assigns, (as tenants in common,) the sum 61. of lawful money of Great Britain, they the said Walter Faynes and Robert Warner, their or either of their heirs and assigns, (as tenants in common,) should, and would, upon such request and payment made, execute in due form of law another lease of the said premises unto the said William Wilton, his executors, administrators, and assigns, for and during the further term of 20 years, to commence from and after the expiration of the said term of 61 years thereby granted, at and under the said yearly rent of 21. 7s. 6th and the usual and general covenants; and so in like manner, at the end and expiration of every 20 years during the said term of 61 years thereby granted, for the like consideration, and upon the like request, should should and would grant and execute another lease of the said premises unto the said William Wilton, his executors. administrators, or assigns, for the further term of 20 years, to commence at and from the expiration of the term then last before granted, at and under the like rent and covenants, as by the said indenture, &c. By virtue of which said indenture the said William Wilton afterwards, to wit, on the said 3d of March 1725, entered into and upon the said demised premises, &c. The declaration then stated that William Wilton afterwards, on the 11th of May, 1785, by indenture did grant, bargain, sell, assign, transfer, and set over, the said demised premises, &c. unto the said John Rubery for the remainder of the term. That by virtue of such assignment John Rubery entered, &c. And that the reversion of the demised premises legally came to, and vested in, the said Jeru ise Clerke, and Thomas Francis, respectively, and their respective heirs and assigns, as tenants in common. Then it stated that John Rubery, at the end and expiration of the third twenty years of the said term next after the making of the said first mentioned indenture, requested the said J. C. Jervoise and Thomas Francis, respectively, as tenants in common, at the proper costs and charges of him the said John Rubery, and upon his the said John Rubery's paying unto them the said J. C. Jervoise and Thomas Francis, as tenants in common, the sum of 61 to grant and execute another lease of the said premises unto him the said John Rubery, for and during the further term of 20 years, to commence at and from the expiration of the said term of 61 years, (being the term then last before granted,) at and under the said yearly rent of 21. 7s. 6d. and the usual and general covenants, and tendered the same, &c. Then followed the breach of covenant; "that the said J. Clerke Jervoise and Thomas Francis, did not, nor would, nor did, nor would, either of them, at the said time when they were so requested as aforesaid, or at any time afterwards, grant or execute another lease of the said premises unto the said John Rubery for and during the further term, to commence as aforesaid, at and under the rent and covenants aforesaid, or for any other term, or at or under any other rent or covenants, or in any other manner whatsoever, but wholly neglected and refused so to do, contrary to the tenor and effect, true intent and meaning, of the said first mentioned indenture, and of the said covenants, &c."  $T_0$ 

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To this there was a general demurrer, and joinder in de-

Russel in

Russel in support of the demurrer. It appears on this declaration that the lessee did not apply at the end of the first or second 20 years of the original term of 61 years for a further term of 20 years; but at the expiration of the third 20 years, in consideration of a fine of six pounds to be then paid, he applied for a further term of 20 years to commence from the time of the grant thereof, to which he is not entitled: for it is obvious from the construction of the covenant that it was the intention of the parties that there should always be forty years intervening between the time of granting a further term of 20 years and the commencement of it; and that the fine should be paid at the time of granting the term. This must necessarily have been the case if the lessee had taken all the three terms, or if he had taken the first only. He might have renewed at the end of the first, second, and third, twenty years, but then he must have taken them in succession; the words, " and so in like manner," can otherwise have no meaning. A term cannot be granted in like manner as a former term has been, if no such term was ever granted. The term then last before granted must mean the term of 20 years, for otherwise the parties would have said, the said term of 61 years; and if it had been intended that the lessee should have a further term of 20 years in the manner stated in the breach of the declaration, instead of saying, " If at the end of the first 20 years, &c." they would have said, " if at the end of the said term, the lessee " choose to have a further term of 20 years he shall have "it; and if at the end of that 20 years he choose to have a "further term of 20 years, he shall have it; and so of the "third." But it is plain that the parties intended that the further term of 20 years should be applied for, and the fine paid, 40 years before the commencement of the term.

If there should be any doubt of this on the words of the covenant, the fine will determine it. If the lessee had taken the first term of 20 years, he must have paid the fine 40 years before the commencement of the term, and in 40 years the fine would be of eight times the value. So that accord-

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<sup>(</sup>a) The Court observed that this was a joint action on a several covenant: but as it was the wish of the parties to take the opinion of the Court on the construction of the covenant, this was argued as if the declaration had been amended.

Rubbay against

ing to what is contended for, for the first term of 20 years he was to pay 481. and for the last only 61.; which is absurd. Besides, when the lessor and lessee contract for a term of 20 years, to commence 40 years afterwards, they contract on equal terms; neither of them can tell whether it will be a losing or a beneficial term, especially as this is an estate in the suburbs of London, where estates are liable to great fluctuations in value. Here the lessee waited till he saw that the term would be beneficial, and then he asked for it: had it been the reverse, he would not have taken it. The lessor had no such option. Therefore, from the plain construction of the covenant, from the time at which the fine was payable, and its value, and the time when the lessee was to signify his intention to renew, it is clear that the lessee, not having taken the first and second terms, cannot be entitled to the third.

Gibbs, contra. This covenant amounts to an agreement by the lessor to grant a reversionary lease of 20 years at any of the three periods in the term of 61 years. The words are "at any time within one year after the expiration of 20 years of the said term, &c." So that the lessee may at the end of any 20 years, demand a lease of 20 years in reversion, to

be attached to the term then in him.

The construction contended for supposes that the lease must be understood in the most beneficial manner for the landlord, but in all cases where words are doubtful, they must

be taken most strongly against the covenantor.

There is no reason to presume from the words of the covenant that the intention of the parties was that 40 years should intervene between the granting and commencement of the further term of 20 years. The covenantee was at liberty to call upon the covenantor after the expiration of 40 years for a further term, even though he had neglected to make such demand at the end of the first 20 years; and the words, "in "like manner," which have been relied on, only point out the right of the lessee to apply for a further term, in the same manner as he might have done if he had made his application at the expiration of the former period of 20 years. The words "last before granted" relate to the term of 61 years, and not to the additional one of 20 years.

As to the less which the lessor would incur by receiving his fine 40 years later than he would otherwise have done, the loss would be reciprocal; for by neglecting to call upon the

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lessor till the end of the term of 61 years, the lessee loses 40 years of his term which he might have had, so that the other derives an advantage from his neglect.

WILLES, J. This question has been argued upon the words of the covenant, and the intention of the parties. If there be a doubt upon the words, it is true that they are to be taken most strongly against the covenantor; but in this case they are very plain. The lessor at any time within one year after the expiration of the first 20 years in the said term, upon the application of the lessee, covenanted to grant a further term of 20 years; then the covenant states that he is "in like manner" to grant a second term of 20 years after the expiration of 40 years of the original lease upon a similar application: that is, the lessee is to apply at the end of every 20 years, so that there may always be 40 years intervening between the grant and the commencement of the additional terms.

This construction is also supported by reason. The reserved rent is 21.6s. per ann. and the lessee now claims at the end of 61 years to have a further lease of 20 years, on paying so small a fine as 61. If this had been paid 40 years before, the lessor would have had the interest of it during the intermediate time, which would have made the consideration much greater. If the plaintiff had wished to have the advantage of this covenant to renew, he should have taken the terms in succession.

ASHHURST, J. It is equally clear from the words, and from the manifest intention of the parties, what should be the construction of this covenant. The words "and so in "like manner," after the term last before granted necessarily mean that the lessee must have applied for the term of 20 years preceding, and it made a very material difference to the lessor, whether this renewal was made at the end of 20 or 60 years.

BULLER, J. This is an agreement on the part of the lessor to grant a further lease on a precedent condition to be per-

formed by the lessee, which he has not done.

It has been argued that the words "last before granted" apply to the term of 61 years; but it is manifest that such was not the intention of the parties, for they used the words "61 years" in the former part of the covenant, when they were speaking of the whole term; then those words must necessarily refer to the term of 20 years last before granted.

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It was optional in the lessee whether he would apply for a renewal of the lease or not: but if he had intended to claim the benefit of such renewal, he ought to have applied for it at the end of the first 20 years.

1786. ardinst PERVOISE:

Iudgment for the defendant.

### FRANCIS KING against SAMUEL PIPPET.

Tuesday, *May* 23d.

DEBT for two penalties of 500% each, under the statute of In an action for bribery the 2 Geo. 2. c. 24. for preventing bribery at elections. at an elec-This was tried at the last Assizes for the county of Devon tion, where before Eyre, Baron, when the plaintiff was nonsuited upon the declarathe ground that there was a variance between the precept tion set

stated in the declaration and the one which was proved.

precept from The declaration recited the writ to the sheriff for the elec- the sheriff to tion of members to serve in parliament; and then proceeded the portto state that the sheriff made his precept to the portreeve of serve of a the borough of Honiton, which concluded in these words, improper in-"and if the said election so made, distinctly, and openly, sertion of " under the seal of the portreeve, and the seals of those who the word should be present at such election, the said portreeve should such precept " certify to the said sheriff, so that the said sheriff should is not a fatal "certify to his said Majesty, in his said Majesty's chancery, variance, but at the day and place aforesaid, without delay; remitting to it will be rejected as "the said sheriff one part of the aforesaid indentures, so strplusage. "that the said sheriff might remit the same to his said Ma-"jesty, annexed to his Majesty's writ."

The precept when produced had not the word "if," which

the Judge thought did not support the declaration.

Gibbs shewed cause against a rule which had been obtained

to set aside this nonsuit.

This precept stated in the declaration is not proved by the real one, which has a perfect conclusion, inasmuch as it contains a positive direction to the portreeve to proceed to election, and return the precept; whereas that set out in the declaration, has an imperfect and conditional conclusion.

The principle laid down in the case of Bristow and Wright (a) decides that this is a legal objection. That was an ac-

(a) Dougl. 642.

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tion against the sheriff for taking goods without leaving a year's rent. In the declaration, the particulars of the demise were set forth, which was held to be unnecessary; but the plaintiff, having undertaken to do it, and not proving them as set forth, was nonsuited. It was said by Lord Mansfield, in that case, that "the distinction is between that "which may be rejected as surplusage (which might have " been struck out on motion) and what cannot. Where the " declaration contains impertinent matter, that will be reject-"ed by the Court, and need not be proved; but if the very " ground of the action be mistated, as where you undertake " to recite that part of the deed on which the action is found-" ed, and it is misrecited, that will be fatal; for then the case " declared on is different from that which is proved, and you " must recover secundum allegata et probata." The question then is, whether the setting out this precept be impertinent or immaterial? If the former, the variance in the declaration is not fatal, because in such case it is not necessary to prove the precept; but if immaterial only, as the plaintiff has undertaken to set out that which he need not have done, he is bound to prove it as stated. Here perhaps it might have been sufficient to have stated that there had been an election, and that at such election the bribery had been committed; but the plaintiff, having undertaken to set out this precept, is bound to prove it as set forth, because he makes out his case through it.

If the insertion of the word "if" make any alteration is the sense, it is a sufficient objection; and it is clear in this case that it alters the signification of every subsequent word, by making that conditional which ought to be positive; therefore every word which follows "if" in the declaration must be taken in a different sense from that in which they are to be

understood in the precept.

It is not enough to say that by the rejection of the word "if" the sense will be complete; for any person reading this record would rather suppose that something had been omitted in the conclusion, than that the word "if" had been improperly inserted in this part.

Lawrence and Watson, contra, argued that the declaration did not affect to set out the tenor of the precept, in which case the variance would have been fatal; but it only stated

that

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that the sheriff had made his precept, by which he had given

certain directions to the portreeve.

The Court may not only read the declaration without the word "if," but even without any part of the precept in which it is contained, because it was not necessary to be set forth. In the case of the King and Beach (a) undertood was written for understood in the assignment of perjury, which was held not to be a fatal variance. If then the Court can supply a letter in order to make sense, they may also reject a word for the same purpose; for the introduction of the word "if" makes the whole sentence unintelligible.

In the case of Bristow and Wright the whole of the contract was necessary to be proved, and consequently the time when the rent was payable; but here the matter stated was perfectly unnecessary. The mode of election and the return by the portreeve to the sheriff were irrelevant to this action, and therefore they may be rejected as surplusage, according to what was said by the Court in Bristow and Wright with res-

pect to irrelevant covenants in a lease,

The King and May (b) was an indictment for perjury, committed in the trial of an indictment for assault, in which were these words, "whereby his life was greatly despaired of: this last indictment was set out in the former, omitting the word "despaired." This was supplied by the Court, upon the ground that the omission of that word made it non-sense; the same reason therefore holds for rejecting this word.

They then cited Wilson against Mawson, at the Sittings after Michaelmas, 13 Geo. 2. at Westminster. That was an action for false imprisonment, and the bill of Middlesex, upon which the party had been arrested, was set forth in the declaration as follows; that the sheriff was commanded to take A. B. (the then defendant) and John Doe, if, &c. and them, &c. so that he might have their bodies before our Lord the King, at Westminster, on, &c. (verbatim) to the The bill of Middlesex, being read, was in these words; the sheriff is commanded to take A. R. and John Doe, if they shall be found in his bailiwick, and them safely keep, so that he may have their bodies before, &c. It was insisted by the defendant's counsel that this was a variance between the bill of Middlesex and the record, and that it was not sufficiently Vol. I. set

(a) Coup. 229.

(b) Dougl 183,

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set out, on account of the words, &c. Sed per Lee, Ch. J. The objection is, that all the bill of Middlesex is not set out in the record: but there is no occasion to set it all out; the substance is sufficient; and there is no variance between the bill of Middlesex and so much of it as is set out in the record.

So also in the case of Hendray against Spencer (a), which was an action brought by the high bailiff of Westminster against the defendant in the nature of an escape. The declaration stated a latitat against Donner and J. Doe with an ac etiam against Donner for 30l. That a warrant was made to the high bailiff, &c. and that the plaintiff (the high bailiff) arrested Donner, and delivered him to the defendant, who promised safely to keep him, but afterwards permitted him to escape, by which means the plaintiff was obliged to pay the The writ produced in evidence was against Donner money. and two others, and not against J. Doe. Mr. Mansfield, on behalf of the defendant, objected that this writ did not prove the declaration, but was a variance; for a writ against Denner and two others could not be the same as a writ against Donner and J. Doe. Wallace, contra, said, the only question was, whether such a writ issued as warranted the arrest of Donner; and that had been proved. Lord Manafield twerruled this objection, and said this was a sufficient writ to warrant the arrest, and that was all that was necessary. And the plaintiff had a verdict.

WILLES, J. I am of opinion that this non suit ought to be set aside. It is agreed that the whole precept need not have been set out; so that stating it was surplusage. It is likewise agreed that the precept is not set out according to its tenor. But it is objected that the last clause of the precept is set out as conditional, instead of its being a positive averment. If it were so, the argument would have some weight; but I do not think the insertion of the word "if" varies the sense of the sentence; but, if it has any effect, it makes nonsense of a precept which ought not to have been set out at all, therefore the Court is bound to reject such a word. The case of the King and Beach (b) applies very strongly. There the omission of the letter "s" did not change the sense; neither, in the present case, does the addition of the word

(a) Sittings at Westminster after Mighaelmas, 1773.

(b) Comp. 229,

word "if" convey a different meaning. If this word be rejected, the sense is complete; and I think we are warranted in rejecting it by the case of *Hendray* v. Spencer, where, though there was a variance in the names of two persons in the writ, yet enough of it was set forth to warrant the arrest.

This is totally different from the case of Bristow v. Wright.

There the demise was particularly set forth, which varied materially from the demise as proved; therefore the sense

itself was different.

Ashhurst, J. I think the Court may and ought to reject the word "if," as surplusage; for on reading the record we see that the word introduced is nonsensical. The Court is bound to judge according to certain and known rules of law, and they must take notice, ex officio, of what is the form of the precept. It is a matter of notoriety; and looking on the record, we see the word "if" inserted, which is contrary to the form of the precept. Therefore this is not like a mitter in pais, of which the Court can know nothing till it comes before them. This case does not appear so strong as those of Hendray v. Spencer, and Wilson v. Mawson; for the addition of a name was a thing which the Court could not possibly know till the production of the writ at the trial; but this is what they must, on reading, know to be wrong. Therefore I am of opinion that the non suit ought to be set aside.

BULLER. 1. The declaration in this case is much longer than it need have been. There is no necessity to set out the precept; but, being set forth, the question is, whether the variance be or be not material? I think it is impossible for any person to read this part of the declaration without knows ing what it should be; every one must see by it that the portreeve is absolutely to certify to the sheriff, &c. The insertion of the word " if" is a mere mistake. The case of the King v. Beach is much stronger than the present. There the Court supplied a letter to make up a word, which was necessary in setting out an indictment: but here it was not neces-sary to state the precept at all. But it does not rest here only. There are other cases equally strong, as Hendray v. Spencer; and Cuming v. Sibly, E. 9 Geo. 3. C. B. which was an action for bribery: there the declaration stated the precept to be directed to the mayor only; but the precept which was proved was directed to the mayor and burgesses; and the only question in the case, which was reserved for the opinion

Kino agginet

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of the Court, was, whether the precept that was proved supported the declaration? The court of Common Pleas was of
opinion that it did, and gave judgment for the plaintiff. In
that case there was a variance in the person to whom the precept was directed, but the Court was of opinion that if it were
the same in substance as that which was set forth in the record, it was sufficient, unless the tenor was stated. So in this
case, the variance, to have any effect, must be a variance of
sense and of something material.

The three principal cases which have been argued in this Court of late years are Shute v. Hornsey (a), Bristow v. Wright (b), and Grant v. Astle (c), all of which were upon contracts. In these kind of cases it is necessary to set out the contract in the declaration; and if it be different in any part, the whole foundation of the action fails, because the contract

is entire.

In the case of the King v. Lookup (d), which was an indictment for perjury, the objection was, that the indictment stated the bill in Chancery to be directed to "Robert Lord Henley, &c." whereas it was directed to "Sir Robert Hen-"ley, Knight, &c." But that objection was over-ruled.

The case of Shuttleworth v. Pilkington (e) is likewise extremely strong. That was an an action on a bail bond; the special original was returnable coram domino regi ubicunque tunc fuerit in Anglia: but the words "ubicunque, &c." were omitted in the bail bond: and it was objected that by the stat. of Hen. 6. (which was pleaded) the shreiff could take no bond but such as corresponded with the writ; whereas this might be to compel an appearance out of England, if the king should happen to be so. But the Court said it was sufficient in these bonds to state in substance the design of the writ; and that they would understand that by appearing before the king was meant before the king in his court, and not before the king in person. And the plaintiff had judgment.

In the present case the sense of the precept, as stated in the declaration, is the same as that which was proved; it commands the returning officer to proceed to an election. Therefore as this is not a variance in sense, I am of opinion that the nonsuit should be set aside (f).

Rule absolute (g).

<sup>(</sup>a) Dougl. 643. (b) Ibid. 640. (c) Ibid. 695. (d) Trin. 7 Geo. 3. B. R. (e 2 Str. 1155. (f) This case came on again on another point, post. 492. (g) V de Wrvil v Shepherd, H. Bl. Rep. C. B. 162; Cwinnet v. Phillips, poet. 3 vol. 643: & Drewry v. Twiss, post. 4 vol. 558.

1786. Wednesday, May 24th.

#### The KING against THOMAS JEFFRIES.

THIS was a conviction on the lottery act (a) before Conviction two justices for the county of Middlesex. The interpret formation charged that on the 10th of March 1786 Thomas quashed, befires of Great Queen-street, &c. did in Great Queen-street cause the aforesaid, in the parish of St. Giles in the Fields, take and receive from one Thomas Jackson the sum of 2s. 9d. of lawful offence to money, &c. And in consideration thereof the said Thomas have been feffries did promise and agree to pay to the said Thomas committed Jackson the sum of one pound and one shilling, if a certain where laid. &c. should be drawn fortunate or unfortunate on the 30th day of drawing the said lottery, convery to the form of the

The evidence was as follows: "Thomas Jackson deposeth and saith, that on the 10th of March last he insured personally with the said Thomas Jeffries No. 18,433, and paid 2s. 9d. to receive one guinea, if drawn blank or prize on the 30th day of drawing, and received the ticket now here produced, which said ticket is in the words and figures following" [describing it].

statute in such case made and provided; by reason whereof,

Erskine objected, that the evidence did not prove the offence to be committed in the place laid in the information, which it ought to have done; for wherever the jurisdiction of the magistrates who try the offence is local, the offence must be proved to have been committed within their juris-

And of this opinion were the Court; therefore the Conviction was quashed.

diction.

(a) 22 Geo. 3. c. 47.

The KING against The Inhabitants of WARBLINGTON. May 24th.

TWO justices removed by an order John Bridger, Ann If a parish his wife, and their six children, from the parish of Ha-want to get rid of a cervant, in the county of Southampton, to the parish of Warbling-tificate, it is ton, in the said county. The Sesions, on appeal, confirmed incumbent the said order, and stated the following case:

William some matter

in discharge thereof; and the Court will not presume such discharge from other facts. A grant of a copy-hold with 1e. fine, 1e. heriot, and 1e, rent, is a purchase within 9 Geo. 1. c. 7. § 5

against War-BLINGTON.

William Bridger, father of the pauper John Bridger, about the year 1736 came into the parish of Havant, with a cer-The King tificate from the parish of Warblington, acknowledging him and his family to be settled in the said parish of Warblington. On the 20th of October 1748, John Moody, esq. the lord of the manor of Havant, at a court baron held for the said manor, by copy of court-roll granted to the said William Bridger and his heirs one parcel of the waste ground, called The Gravel Pit, lying and being at the North side of the east townend of Havant, which said parcel of ground was parcel of the said manor, and within the parish of Havant, and which did not appear to this Court ever to have been granted by copy of court-roll before the said 20th of October 1748. The said William Bridger, by virtue of the said grant, entered on the said parcel of ground, and built a house thereon, and lived therein for several years after as the owner thereof. On the 12th of November 1751, he borrowed of Mary Roper the sum of 100/,; and for securing the same, at a court baron held on that day for the said manor, surrendered the same premises into the hands of the lord, as by the said surrender appears. The said surrender was on the 4th of October 1752 presented in due manner at another court, as appears by the presentment thereof. On the 24th of October 1754 the said Mary Roper was, in pursuance of the said surrender, and in consequence of the mortgage money not being paid, admitted to the same premises. On the 13th of June 1763 she sold her interest to John Hammond, who was thereupon admitted; and after the death of the said William Bridger. his heir at law sold his equity of redemption to the said John Hammond for 201. 17s. and surrendered the same accordingly. And the said John Hammond was admitted. That it appeared to this court that for many years before the death of the said John Moody, who died in the year 1764 the said John Moody was used to grant parcels of the waste of the said manor for small pecuniary considerations. And that a Mr. Newland, who was called as a witness on the part of the appellants to produce the court-rolls of the manor of Havant, of which manor he is steward, never knew the said John Moody to make any such grant without a pecuniary consideration. And it further appeared to this Court, that the said Mr. Newland for some years before, and till the year 1743 or 1744, was clerk to the said John Moody (who was an attorney). And that the said Mr. Newland in 1763 became steward

steward to the said John Moody for the said manor of Havant, and continued so to be till the said John Moody's death. That the value of the said piece of ground at the time of the The Kine said grant did not exceed 30s. or 40s. That at the time of the said grant the said William Rridger was a very poor and indigent man, living in the said parish of Havant. And it also appeared to the Court, by the inspection of the court-books of the said manor, that it is not customary to express in the surrenders or admissions of any tenant of the manor therein the consideration for granting the same. And no evidence whatever was given whether any pecuniary consideration was given for the said grant, or whether the said grant was voluntary, and without a pecuniary consideration. It was agreed by the counsel for the appellants and respondents, that on the argument of this case in the court of king's bench copies of the several grants, surrenders, and admissions, containing also the entries on the margin of the several courtbooks, and opposite to such grants, surrenders, and admissions, should be produced.

In consequence of the above agreement several copies of the court-roll were now read in court; by one of which it appeared that William Bridger was admitted in the year 1748 on the lord's grant to one parcel of land, called the Gravelland; and in the copy of his admission were these words, " fine one shilling, heriot one shilling, quit-rent one shilling." And in the margin of all the copies was inserted " fine one 4 shilling."

Mingay and Lawrence, in support of the order of Sessions, contended that, the pauper having come into the parish by certificate, it was incumbent on the other side to shew positively that the certificate had been discharged by some subsequent event. They should therefore prove to the satisfaction of the Court that this was a voluntary gift, without any pecuniary consideration moving from the pauper's father to the lord. The Sessions have not decided that this was a voluntary gift; they have merely stated the facts without drawing the conclusion either way. If any thing is to be collected from what they have stated, it is rather that this is a purchase, and not a gift; and being under the value of 30%. the certificate still remains in force under the 9th of Geo. 1. c. 7. s. 5. by which no purchase under the value of 30%. shall give a settlement. But the circumstances stated in the case put it out of all doubt; for the fine paid by William Bridger must be considered as a pecuniary consideration for the

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the purchase of the estate. It was so considered in the case of St. Paul's Walden and Kempston, Foley, 238. It also ap-The King pears by the evidence of Newland, the steward of the manor, that the lord never made such a grant as the present without BLINGTON. a pecuniary consideration.

The improved value of the estate, since the time of its being granted, will make no difference; it is the value of the estate at the time of the purchase which gives a settlement. and not the subsequent improvements; and the value is ascertained by the sum really paid. Rex v. Dunchurch, Burr. Set. Cas. 553.

Besides, it does not appear in this case whether the lord had a right to grant the land as copyhold; and indeed the Sessions have impliedly negatived any immemorial custom in

him to grant such an estate.

Morris, and Burrough, contra, relied upon the ground that this was not a purchase within the 9 Geo. 1. This is a common law settlement in opposition to a settlement gained by any of the statutes. Under the 13 and 14 Car. 2. c. 12. no person was removable from his own property; and living irremovable thereon for 40 days he gained a settlement. Then the statute 9 and 10 W. S. c. 11. which relates to certificated persons alone, declares that no such persons shall gain a settlement in another parish, except in two ways, either by renting a tenement of 10l. a year, or by serving an annual office. From that time to the time of passing the statute of 9 Geo. 1. it never was doubted but that a certificated person could gain a settlement by a residence on his own estate, whatever the value might be: but this act relates equally to uncertificated as well as certificated persons: therefore a man who is in possession of an estate which he does not acquire by purchase for money under 30% gains a settlement by residence thereon for 40 days, whether he be a certificated man or not. It has been long agreed that the word "purchase" in the act of the 9 Geo. 1. is confined to a purchase for a pecuniary consideration. One of the cases decides that a gift by a father to his daughter (a) is not a purchase within the meaning of the act; yet according to the general legal signification of the word, such a gift would be considered as a purchase. And it has been expressly determined in Rex v. Marwood (b) that the word "purchase," in that

<sup>(</sup>a) Rex v. Ingleton, Burr. Set. Cas. 560. (b)Burr Set. Cas. 39Q.

that statute, is to be taken in the most common acceptation of the word. Therefore whatever estate the pauper had, whether more or less than 30% it was sufficient to satisfy the cer- The King tificate in this case.

But it has been said that this is a purchase in point of fact, BLINGTON. because of the shilling fine, &c. In the first place, purchase is a fact, and as the Sessions have not found it, the Court cannot presume it; they can in no case presume a fact. in trover for plate and jewels, where the defendant refuses to deliver them upon request, this is prima facie evidence of a conversion, but if it be found by special verdict that the plaintiff requested, and the defendant refused to deliver them, the Court cannot adjudge it a conversion, because it is a fact. (a). So in the case of The King and Bolder, 1784, where the facts stated were evidence of a disseisin, this was urged by the counsel; but the Court said that disseisin was a fact which they could not infer, as the Sessions had not found it.

But the very case itself precludes the idea of any consideration; for the Sessions state that no evidence whatever was offered that any pecuniary consideration had been given for the grant in question; none such appears upon the copy of the Court-roll; and it was incumbent on the respondents to have

shewn that there had been a pecuniary consideration.

As to the fine, that was paid for leave to alien, and not as the consideration money. It can never be supposed that a fine of one shilling could be intended as the purchase-money of a copyhold of inheritance, however small the value might be; but rather as evidence of the tenure, to show of whom holden. Besides, the same fine of one shilling appears on the copies of all the admissions and surrenders; and it cannot be presumed that the purchase-money was the same for all the grants. It might as well have been said in the case of The King and St. Mary Whitechapel (b) that the reserved rent of 6d. per ann. was the consideration of the leasehold; but the Court there held that the pauper gained a settlement. In the case of The King v. Tarrant Launceston (c), the pauper's father married a woman whose mother was possessed of a leasehold cottage for 99 years, determinable on lives. On the marriage, the mother gave her daughter and the pauper's father liberty to live in the cottage, but made no gift or conveyance of the same. On the mother's Vol. I. K k death.

(a) 10 Co. 56. (b) Barr. Set. Car. 55. (c) Easter, 22 Geo. 3.

againet War-BLINGTON.

death, the pauper's father (not having taken out letters of administration) surrendered the old lease to the lady of the The King manor, who, in consideration thereof, and of 30s, granted to the pauper's father a further lease of the cottage. Lord Mansfield said that was not a purchase, but a surrender of the old lease, and getting a new one upon payment of the

As to the case in Foley, it only goes to shew that fine is an equivocal phrase, and that it may in some cases be taken for the consideration. But here the Sessions have expressly negatived that supposition, by stating that there was no consideration: and wherever there is a doubt, the presumption will always be in favour of the settlement.

As to the evidence of Newland, it applies altogether to a subsequent period, and therefore does not affect the grant,

under which the pauper claims.

The next point relied on, is, that the Sessions have stated that it did not appear to them that this land was ever granted by copy of court-roll before the year 1748; yet it is sufficient that there was no evidence to warrant them in stating that it never had been granted by copy before, for after so long a possession the Court will rather presume that it was. It was not competent to the sessions to enquire whether this was a legal copyhold, or not; that question could only arise between the lord and some other person, and no stranger had a right to interfere. It was in fact granted as copyhold, and that is sufficient for this purpose. Yet supposing it was not copyhold, and that the donce had only an equitable interest, that would make no difference for the purpose of gaining a settlement.

WILLES, J. Great latitude has been taken in arguing this question, though it lies in a very narrow compass; for it is merely this, whether, by any thing that has happened, the parish of Warblington can get rid of this certificate? If not it still continues in force. Then the question is, whether this grant, so made by the lord of the manor to the pauper's father was a voluntary grant, or was made for a valuable consideration? Notwithstanding what has been said, I think the proof lies on the appellants to shew that this was a voluntary grant. The parish who granted must get rid of the certificate: and if that can only be done by presumption, it must stand good; for we cannot presume one way or the other. But supposing the court could presume either way, it would be that this was a purchase.

a purchase. The case states a grant by the lord of the manor 1786. of a small parcel of waste; however small the consideration might be, I should still hold it a purchase; for the smallness of The Kine the consideration is impaterial. From all the facts stated in this case, it appears that this grant was made for a small BLINGTOR. pecuniary consideration: then it is not a voluntary grant; and, it being a purchase under 301. it does not give a settlement since the statute of 9 Geo. 1.

Supposing it to be true, as contended, that the fine is a fee for alienation, at all events that is no answer to the heriot and rent reserved, for if a person meant to make a free gift, he would not reserve a heriot or rent; but both are here reserved.

Another point has been made on the validity of this grant, because it is said that the land was not demised by copy before: but it is not expressly stated that the land was not so granted before that time; and the Sessions have stated that this grant by copy was made so long ago as the year 1748, under which the grantee entered, and built a house, and expended 100%. At all events the objection is got rid of by saying that however defective such a grant might originally have been, yet as there has been so long a possession under it,

that is a strong presumption that it was good.

ASERBAST, J. If it were necessary to give any opinion upon the point, whether supposing this to be a voluntary grant, the party would gain a settlement, I should have wished the matter to have undergone further discussion. seems extraordinary that in the teeth of an act of parliament this matter should have been taken for granted; nothing can be stronger than the words of the certificate act, which says, whereas some doubts have arisen upon the construction of \* the said act, (meaning the 8 & 9 W. 3. c. 30.) by what acts " any person coming to inhabit, or reside, within any parish, by virtue of any certificate, may procure a legal settlement " in such parish, &c. be it enacted, &c. that no person or " persons whatsoever, who shall come into any parish by any " such certificate as aforesaid, shall be adjudged by any act " whetsoever to have procured a legal settlement in such pa-" rish, unless he or they shall really and bonu fide take a lease " of a tenement of the value of 101, or shall execute some annu-" al office in such parish, being legally placed in such office."

It is singular that a practice should have prevailed in opposition to this act of parliament, when the words are so strong. The KING But we are not under the necessity of deciding that point; for, a certificate being once given, it is necessary for the parish who wish to get rid of it to shew some matter in discharge thereof. They ought then to have shewn that this was a voluntary grant; and it did not lie upon the other side to prove that this was a grant for a valuable consideration: whoever wants to set aside that which has once existed, must shew something which destroys it. But how does this case stand? Supposing it was necessary to have been proved on the part of the respondents, I think there does appear sufficient in this case to shew that it was a purchase. A purchase is the acquisition of something for an equivalent: it is a quid pro quo. If there be a valuable consideration, it is a purchase in the legal sense; and it makes no difference whether it comes in the form of a present payment, or in any other way. Here there appears to be a quid pro quo from the state of the case, and from the entries in the lord's court which have been read. For there was a fine paid upon admission, and there was a valuable reservation of a heriot and rent, and that is a sufficient foundation for a purchase; and there having been a consideration, it cannot be called a voluntary gift.

BULLER, J. I reserve to myself the consideration of the question, what effect a voluntary gift would have on a certifi-

cate-person as to the giving of a settlement.

I agree that under the act of 9 Geo. 1. the word "purchase" has not the same extensive sense as is generally annexed to But no case has been cited at the bar, where a certificate has been discharged by a voluntary gift. I am aware of the case of the King and Ingleton (a) but that was not argued; it was given up under the idea that it was governed by the King and Marwood, which was not the case of a certificated man.

But the present case is very clear. The first question is, on whom the onus probandi lies? It has been said here that it was the duty of the respondents to make out their case; but I think it was incumbent on the appellants to have satisfied the Sessions that this was a voluntary grant, and they not having done so cannot now impeach the order; for if it does not appear on the face of it to be wrong, the Court must take for granted that it is right. Then can the appellanta

(a) Burr. Sett. Cas. 560.

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pellants say that the order of Sessions on the face of it is

wrong? If not, we must confirm it.

This case is not altogether so correctly stated as it ought The Kine to have been. It is the duty of the Sessions to find all the facts, and not to leave it to us to infer them from the evi-BLINGTON. dence. They ought to have stated whether this was a gift, or a purchase. However, that would only be a reason for sending the case back to them to be re-stated, and we already see enough to convince us of what their opinion was: for they have found that the certificate still remains, by confirming the original order; and they have stated many facts, from whence, if I were at liberty so to do, I should draw the same conclusion that they have done.

Both orders affirmed (a).

(a) In the case of the King and Cold Ashton, Burr. Sett. Cas. 450, which was not mentioned upon this occasion. Lord Mansfield's opinion upon the construction of the certificate act is very strong; an estate of a man's own, from which "he cannot be removed, has been, by construction, (and a very reasonable one "too) holden to be within the 9 and 10 Will. c 3.11 for it would be a very hard "thing to remove a man from his own estate. And the rule holds as well in " the case of a certificate-person, as in any other case, that no man ought to be " removed from his own property and estate." Vid. R. v. Ufton, post 3 vol. 251.

#### The KING against HENRY SALOMONS.

Wednesday. May 24th.

HIS was a conviction on the lottery act of 22 Geo. 3. c. A convic-47. Middlesex and Westminster, to wit; Be it remem-tion for the bered that on the 29th December in the 26th year, &c. at the where there public office in Bow-street, in the parish of St. Paul, Covent are two dis-Garden, in the city and liberty of Westminster, and county of tinct offen-Middlesex, Nathaniel Barret of West-Smithfield, in the city of ces charged in the in-London, shoemaker, who prosecutes as well, &c. in this be-formation, is half, in his proper person cometh before us Sir S. Wright, bad. Qu. knight, and William Addington, esquire, two of the justices Whether a of our lord the king assigned to keep the peace of our said be convictlord the king in and for the said city, liberty, and county, &c. ed of two and giveth us the said justices to understand and be informed distinct pethat after the 25th July 1782, to wit, on the 27th of December the same in-1785, one Henry Salomons, of Coventry-Street, in the parish formation! of St. James, in the said city, liberty, and county, gentleman, not regarding the statutes of our lord the king, nor fearing the penalties therein contained, did in the parish aforesaid, in

against SALO-MONS.

the city, liberty and county aforesaid, on the 27th of December aforesaid, keep an office for dealing in share's of lottery The King tickets in a lottery then authorised and established by an act of parliament made in the parliament of our said lord the king, at a session thereof holden at Westminster in the twenty-fifth year of his reign, entitled "An act for granting to his " majesty a certain sum of money to be raised by a lottery," To wit the share of a ticket, numbered 34,907; and did then and there take and receive of and from Anne Aimes the sum of three shillings, &c. for or in such respect of a share and benefit in the lottery ticket aforesaid, numbered 34,907, without the authority of a license, contrary to the statute in that case made and provided; and the said Henry Salomons, on the said 27th of December, in the parish aforesaid, &c. did keep an office for registering the numbers of lottery tickets then in the said lottery so established as aforesaid, and did then and there take and receive of and from the said Anne Aimes, the sum of three shillings, &c. for the registering of a lottery ticket, then and still undrawn, without the authority of a license, contrary to the form of the statute, &c.; whereby and by force of the statute, &c. the said Henry Salamons hath for his said offence forfeited the sum of 1001. &c.

The conviction, after having stated the evidence of the

witnesses, proceeded as follows:

Whereupon, all and singular the premises being considered, and mature deliberation being thereupon had, it manifestly appears to us the said justices that the said Henry Salomons is guilty of the offence charged upon him in and by the said information of the said Nathaniel Barret. It is therefore adjudged by us the said justices that the said Henry Salomons be convicted, and he is hereby convicted by us the said justices, of the said offence charged upon him in and by the said information, according to the form of the statute in that case made and provided. And we the said justices do award and adjudge that the said Henry Salomons hath for his said offence forfeited and do pay the sum of 100/. &c.

Erskine now took several objections to this conviction.

1st. It does not appear that this offence was committed within the jurisdiction of the magistrates convicting. Here the justices are stated to be justices for the said city; but as both London and Westminster are mentioned, it does not distinctly appear to which city it refers. 2 Hale's Pleas Cr. 180. Cro. Eliz. 739.

2dly,

2dly, The defendant is charged with doing a certain act without a license; therefore the Court must suppose that the act would have been legal, if he had had a license. The penalty for this offence is 1001. under the 6th section; but it does not appear that the ticket, of which the share in question is supposed to be part, was such a legal ticket as a person could sell if he had taken out a license; for in order to enable a person to sell such shares under a license he must have the property of the ticket, and must deposit it with the Receiver General who issues out the shares; but this appears only to be a gambling policy, for which he would have been liable to a penalty of 501. only under the 14th section. And the words "contra formam statuti" will not cure an omission of charge in the information; it is not enough to shew that the party charged has acted contrary to the statute, but it must be shewn in what manner.

the party charged has acted contrary to the statute, but it must be shewn in what manner.

The words are that he kept an office for dealing in shares of lettery tickets, to wit, the share of a ticket, numbered 34,967. Suppose a person opened an office for the share of a ticket, it would not be necessary to take out a license. In the case of the King and Little (a) a conviction against the defendant for offering to sell goods, &c. as a hawker and pedlar without

proved of selling a parcel of silk handkerchiefs to a particular

3dly, This is not said to be a ticket in the State Lottery.
This falls within the objection taken in The King and

license was quashed, because there was only one single act

Trelawney (b).

4thly, The defendant is charged with keeping an office for registering tickets without having a license; but here is no evidence to support this charge.

Bearcroft, contra, was proceeding to answer these objec-

tions in order: but

Per curiam, the conviction is bad on another ground, for there is a duplicity of charge. The defendant is charged with dealing in shares of lottery tickets, and with registering tickets without license, and he is convicted of the said offence, so that it does not appear of what offence he is convicted.

A conviction must be good in all its parts; the information must be supported by the evidence, and the judgment must be supported by both. Here the defendant is charged

with

(a) 1 Barr. 609.

(b) Ante 222.



1786. with two distinct offences, each of which would subject him to a separate penalty; and supposing they could both have The King been included in one conviction, which is to be doubted, the defendant should have been convicted of both. A judgment for too little is as bad as a judgment for too much.

Conviction quashed.

### SMITH against WALLIS.

Under the 25 Geo. 3. e. 50. only dants who are acquitted upon a prosecution for are entitled to treble costs.

VERDICT had been given for the defendant in an action on the late game act, for shooting without a certithose defen-ficate. And the master had taxed treble costs under that (a) clause in the act for protecting persons sued for any thing done in pursuance of the act.

Bower now moved that the Master might review his taxseizing guns ation, on the ground that the statute only intended to give treble costs to those persons who were prosecuted for seizing

guns. Abbot opposed this motion in the first instance, and contended that the act also meant to give treble costs to persons sued for penalties under the act.

The Court were of a different opinion, and made the Rule absolute.

(a) Sect. 28.

Friday, May 26th.

# LOCKYER and Others against OFFLEY.

A ship being insured for a underwriter is not liable for any loss

24 bours in

port ;

though

HIS was an action on a policy of insurance on the ship Hope from Hamburgh to London, subscribed by the devoyage the fendant on the 19th of August 1785, for the sum of 200% at one guinea per cent.

The cause came on to be tried at the sittings after Hilary arising from Term, 1786, at Guildhall, before Buller, J. when the jury seizure after found a verdict for the plaintiffs subject to the opinion of the Court on the following case.

> That the defendant under-wrote the policy stated in the declaration for the sum of 200/. at one guinea per cent.

such seizure That the plaintiffs were interested in the ship to the amount sequence of of the sum insured. was in con-That

an act of sanuggling committed by the master during the voyage.

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That in the course of the voyage the master committed barratry by smuggling on his own account, by hovering and running brandy on shore in casks under 60 gallons.

Lockyer against Offley.

That on the 1st September 1785 the ship arrived in safety at her moorings in the river Thames, and remained there in safety till the 27th of the said month of September, when she was seized by the revenue officers for the smuggling before stated.

That about a fortnight or three weeks after the seizure the plaintiffs informed the underwriters thereof; and that they would hold them liable on the policy.

That on the 20th October 1785 the following petition was presented to the commissioners of his majesty's customs:

" London, 20th October 1785.

" May it please your Honors,

"In answer to our former petitions to your honourable "board, relating to the seizure of our ship the Hope, late " John Law, master, from Hamburgh, by Mr. Hunter, tide "surveyor of his Majesty's customs, we there find your ho-"nourable board has ordered the said ship to be delivered to "us upon our giving sufficient bail or security for her value "until the issue was terminated, for which indulgence we re-"turn our unfeigned thanks. But from the state of our in-"nocent as well as our distressed situation in this transaction, "we are led further to solicit your Honors' reconsideration "of our petition, and to order the vessel to be delivered to " us upon a moderate compensation being made to the seiz-" ing officer for his diligence; and as we now have an instant "employ for the vessel, we are in hopes by your Honors' "protection and humanity we shall be enabled by such em-"ploy to make good our heavy losses, which we have sus-" tained by the villany of the master.

"We are with the greatest respect, &c.

" William Parr,

" for

' Thomas Lockyer, Edw. Sibull, & Self."

The following answer was given by the commissioners to the said petition; "That as the ship had been guilty of a gross "violation of the laws, the prosecution against her must pro-Vol. I. "ceed, 1786, Ecckyer against Orriey. "ceed, but that the owners should be at liberty to compound

" according to the rules of the Exchequer."

That the ship was appraised at the sum of 345L and by the course of the Court of Exchequer the ship would have been restored to the plaintiffs upon payment of 250L besides costs and charges, which would all together have amounted to the sum of 329L 9s. 7d.

That on the November 1785, the following notice was indorsed on the policy, and was shewn to the underwrivers

to subscribe, but they refused to subscribe it.

"Whereas the within mentioned ship the Hope has been " seized by officers of his Majesty's customs, in consequence " of their having received information that John Law the "master of the said ship has been guilty of barratry, in smug-"gling and running certain quantities of foreign spirits in the course of the within mentioned voyage from Hamburgh to " London; and the said officers by order of the honourable the f Commissioners of his Majesty's customs intend to prosecute " the said ship to condemnation; we the underwriters on this " policy do hereby request and authorize the assured to use "all such means as they may judge, or be advised to do proper for the liberation and recovery of the said ship, and " to prevent a condemnation thereof, either by giving bail, " defending the said suit, or by satisfying, or compromising with, the said officers, or otherwise as the circumstances of "the case may admit or require; and we do hereby promise "to pay and indemnify the assured for all costs and charges. "which they may disburse or be subject to by and in conse-" guence thereof.

#### " London, Nov. 1785."

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover against the defendant for any and what sum? If the Court shall be of opinion that the plaintiffs are entitled to recover, then a verdict to be entered for such sum as the Court shall think fit: but if the Court shall be of opinion that the plaintiffs are not entitled to recover, then a verdict to be entered for the defendant.

Law, for the plaintiffs.

The principal question which arises in this case is, whether the seizure of a ship after the completion of her voyage, for a course

cause of forfeiture accruing during the voyage; is within the po-

liey? Then,

the assured, having given early notice that they should hold the underwriter liable, and having followed up their claim in the manner stated in the case, are entitled to abandon?

A third question will arise out of the second, as to the sum

which the plaintiffs are to recover;

As to the first. There can be no doubt in this case but that the loss was occasioned by the barratry of the master; it Smuggling is an act of barratry, the necessary consequence of which is the forfeiture of the vessel. feiture is incurred under the 24 Geo. 3. c. 47. the first section of which declares that any ship or vessel by hovering in the manner the ship in question did shall be forfeited; and as no particular time is mentioned when the seizure is to be made, the forfeiture attaches the moment the cause of seizure arises. The ship may be seized as soon afterwards as possible. though the forfeiture of goods to the crown for treason and felony only relates to the time of conviction, and forfeiture of lands has relation back to the time of the fact committed, yet the acts relating to the revenue are sui generis; and the forfeiture accrues the instant the fact is committed; for as the time of seizure is indefinite, it follows that the officers have the liberty of seizing when the cause arises. Now when the forfeiture is incurred, nothing can purge it but the subsequent acquittal of the vessel, or the grace of the crown in remitting it. This is not like the case of a death's wound; for if a ship receive a wound, which does not cause her immediate death, it is uncertain when the loss will be complete: but here the loss has actually taken place. This is indeed so far a complete less that the ship was forfeited the moment the smuggling was committed, even though she had afterwards come into the hands of a bona fide purchaser; and the insured cannot posaibly stand in a better situation than a purchaser for a bona fide consideration without notice. This is not only an insurance against any loss which may happen during the voyage, but also against any future damage which may arise from any act done during that time. For in the case of a capture and ransom the assured receive no actual injury during the voyage; it only subjects them to an action on the contract (the rantom bill); so that it is contingent at the time of ransoming, not only whether such an action will he brought, but also whether the captors will recover; in such case therefore there

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against
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LOCKYER against OFFLEY.

is no actual damage to the insured at the time: but in the present case the ship was liable to be seized immediately after the act done. If this be not an absolute loss incurred at the time, yet it is a consequence of a damage done during the voyage. In Vallejo and Wheeler (a) the loss was in consequence of the barratry of the master; and Lord Mansfield there said, "Whether the loss happened in the act of barratry, that is, during the fraudulent voyage, or after, is immaterial (b)."

BULLER, J. observed, that in that case the voyage insured

was lost.

Law. There is no difference, for the barratry here is stated to be by hovering; and hovering is a deviation. In Cock and Townsend, Lord Camden held that cruising for one night was a deviation. And it has been determined, that if a ship stand still, that is likewise a deviation. Here the hovering put a complete stop to the voyage; the deviation was founded on a criminal intent. It is immaterial whether the loss happen during the fraudulent voyage or not.

If the assured cannot recover in this case, underwriters would never be liable for this species of barratry by smuggling; for the seizure can scarcely ever be made till the vessel has

been in port (wenty-four hours.

2dly, As to the abandonment. This comes within the doctrine laid down in the cases of Goss v. Withers (c), and Hamilton v. Mendes (d), in which latter case Lord Manafield speaking of abandonment in case of a re-capture, said "If the "salvage be high, if further expence be necessary, and if the "insurer will not engage, in all events, to bear that expence, "the insured may abandon." In the present case, if there had been restitution of the ship, the salvage would have been very high, further expence would have been necessary; but the insurer refused to bear such expence, therefore the assured had a right to abandon.

Then if the Court shall be of opinion that the assured had a right to abandon, they are entitled to recover the whole sum; for it is found by the case that the plaintiffs were interested in the ship to to the amount of the sum insured; which is the only question which can arise where it is settled that the assured

may abandon.

Pigott, for the defendant.

Nothing is more common than a seizure of a ship after she has been in port twenty-four hours for smuggling during the course of

(a) Cowp. 143. (b) Ibid. 155. (c) 2 Burr. 683. (d) Ibid. 1198.

of the voyage, and yet this is the first instance in which such an action has been brought against an underwriter on such a policy as the present; which affords a strong argument that LOCKIDA the insurer is not liable in such a case.

aguinet OFFLEY.

The nature of this contract is an undertaking on the part of the underwriter that the ship insured shall arrive in safety at the destined port, and continue so twenty-four hours. losses therefore insured against, of whatsoever kind, must happen during that t me. There is a mistake in stating that the act insured against is the act of barratry; it is a loss by barratry; and the rule contended for on the other side would be productive of the most dangerous consequences.

It can never be said that this hovering was a deviation. is by no means like cruising. The word hovering was only inserted in the case for the purpose of describing the particular kind of smuggling. No such question was intended to be agi-

tated.

In Vallejo and Wheeler, not only the act of barratry, but also the loss, was completed during the vovage insured. ship had never been in safety at the destined port, which was the event insured; she was lost in the course of the voyage; and the Court will not carry that case farther than the circumstances of it will warrant. But here the smuggling is only the inception of the loss, and not the loss itself; the consummation of it by the act of seizure is afterwards. If the loss be not complete during the voyage, the contract is fulfilled. determine that the insurer in this case is liable, would be to subject underwriters to additional risks, for which they have hitherto thought themselves not answerable: and as the attorney-general may at any distance of time file an information and obtain sentence of condemnation, all accounts between the parties may perhaps be liquidated before any such prosecution is commenced; an average loss may even be paid; and the policy itself cancelled.

No change of property takes place in consequence of any act of smuggling till condemnation of the vessel. Not that it is necessary that a sentence of condemnation must be passed during the voyage to entitle the assured to recover; but he must be dispossessed of his property during the voyage.

If the sentence of condemnation had relation back to the time when the forfeiture attached, the crown would be entitled to receive the profits of any voyage which the ship may have

made

made in the intermediate time; but that can never be contended for

LOCKYLE againet OFFLER

With respect to the other part of the case: at all events the defendant is only liable for his proportion of so much as the plaintiffs could have redeemed the ship for. And if the plaintiss even had a right to abandon, it is sufficient to say that is fact there was no abandonment. This notice to the underwriter relative to the seizure was not like an abandonment. If the assured had intended at that time to abandon, they would have said that they would have nothing more to do with the But instead of that, they only gave notice that the vessel had been seized, and that they should hold the defendant liable. The attempt to abandon was long subsequent to that time.

It remains yet totally unexplained why the assured did not redeem the ship for 329/.; which gives great reason to conclude that she was not worth more than that sum.

Under these circumstances he contended that the plaintiffs were not entitled to recover at all; but, if the court should be of opinion that the defendant was liable, at all events he was only liable for that proportion of the 2004 which 3294 bore to the whole sum insured.

Law, in reply.—This action is only novel from the circumstance of the owners not having been concerned in the smuggling, in which case the underwriter would not have been liable; but this loss has been occasioned by the misconduct of the master, which is one of the events insured against This loss arises in consequence of smuggling during the voyage; and is like the case of damage actually received during the voyage, where the loss is not complete at that time, but afterwards when the expence is paid.

In answer to the owners being entitled to the intermediate profits of the ship, from which it was argued that therefore they had the property; it is sufficient to say that though the possession remains in them till the seizure, yet the property is altered the moment the cause of forfeiture accrues.

In the case of ransom, the damage is future. The ransom bill may be lost, or the hostage himself drowned; but the lise bility of the captured has relation back to the time of entering into the contract.

As to the time being unlimited when the attorney-general may file his information, and the underwriters consequently continuing

against

continuing liable; it is equally hard as against a bona fide pur-

chaser of a ship without notice.

To prove that this was a direct and immediate injury with- Lockyan in the policy, he cited Jones v. Schmoll (a), where the slaves who died in consequence of wounds which they had received during the mutiny were to be paid for. If that mutiny had taken place just before the ship went into port, and the slaves had died of their wounds after she had been in port 24 hours, such a loss would equally have been within the policy.

So far from this being an attempt on the part of the assured to turn a partial into a total loss, the plaintiffs gave notice to the defendant immediately after the seizure, and desired him to indemnify them. After such notice, no formal abandon-

ment was necessary.

The Court ordered this matter to stand for a second argument; but a few days afterwards they intimated that no more light could be thrown upon the subject by another argument. And now, on this day,

WILLES, J. delivered the unanimous opinion of the Court.

After stating the case;

The question for the consideration of the Court is, whether the plaintiffs can recover under these circumstances against the defendants? and there is no doubt in this case but that the master was guilty of barratry by amuggling on his own account,

without the privity of his owners.

Many definitions of barratry are to be found in the books, but perhaps this general one may comprehend almost all the causes. Barratry is every species of fraud or knauery in the master of the ship by which the freighters or owners are injured; and in this light a criminal deviation is barratry, if the deviation be without their consent.

But the general question here is, whether, as the loss occasioned by the barratry of the master did not happen during the continuance of the voyage, the insurers are liable? I must own this appears to me to be a novel question, and not to have been decided by any former determinations. But as in all commercial transactions the great object is certainty, it will be necessary for this Court to lay down some rule and it is of more consequence that the rule should be certain, than when ther it is established one way or the other.

Difficulties

(a) Ante, 130, n. a.

LOCKYER against OFFLEY.

Difficulties occur on both sides in laying down any rule. The first thing to be observed is, that the policy by the terms of it is an undertaking by the insurer for a limited time, during the voyage from Hamburgh to London, till the ship has been moored 24 hours in safety; and the ship was not actually seized till near a month afterwards. But it has been said, that under the 24 Geo. 3. c. 47. and the excise laws, the forfeiture attaches the moment the act is done, and that the barratry was committed during the voyage. It may be so as to some purposes, as to prevent intermediate alienations or incumbrances; but I think the actual property is not altered till after the seizure, though it may be before condemnation.

I will put this case; suppose before the seizure of the ship, she had gone another voyage, and on her return had been seized, would the crown be entitled to an account of her earnings, after deducting the expences of the outfit? Surely not. Till the seizure of the ship, it was not certain that the officers of the crown knew of the illicit trade carried on by the master, or whether they would take advantage of the forfeiture. It would be a dangerous doctrine to lay down that the insurer should in all cases be liable to remote consequential damages. This has been compared to a death's wound received during the voyage, which subjected the ship to a subsequent loss. To this point the case of Meretony and Dunlope (a) seems very material. That was an insurance on a ship for six months, and three days before the expiration of the time she received her death's wound, but, by purnping, was kept affoat till three days after the time: there the verdict was given for the insurer, which was confirmed by the Court.

I will put another case; suppose an insurance on a man's life for a year, and some short time before the expiration of the term he receives a mortal wound, of which he dies after the year, the insurer would not be liable.

The case of Vallejo and Wheeler was cited for the plaintiffs: but that does not conclude this question, for there the ship

was lost during the voyage.

But it was also argued that the ship, even in the hands of a fair purchaser, would be liable to the forfeiture. I do not know that it has ever been so decided; it may depend on circumstances, such as length of possession, laches in seizing, or other

matters.

(a) E. 23 Geo. 3.

matters. But suppose the law to be so, it does not follow from thence, that though the ship is always liable to a confiscation, yet that the insurer at any distance of time is answerable for LOCKYER the loss under a limited undertaking.

1786. against OFFLET.

And this brings me to that part of the case, which weighs most with the Court in favour of the defendant, and to which it does not appear to us that any sufficient answer has been given. It was agreed in the argument, that the custom-house officers might seize for the forfeiture within three years after the fact committed; and that the attorney general might file an information at any time whilst the ship was in being. the insurer during all this time to continue liable? the ship had gone several voyages afterwards; and suppose a partial loss paid, and the underwriter's name struck off, shall an action be brought on the policy afterwards? His accounts could never be settled, nor could he be finally discharged, while the ship was in existence. Such a position would be monstrous, and would be attended with infinite inconvenience. There must be some certain and reasonable limitation in point of time laid down by the Court, when the insurer shall be released from his engagement. If he be liable for a month, he may be for a year, and so on. And we all think that the law on insurances would be left unsettled, and in much confusion, if any other time were suggested than that prescribed by the policy, namely the continuance of the voyage, and the ship's being moored 24 hours in safety.

We are all therefore of opinion that judgment ought to be

given for the defendant.

These being our sentiments, there is no occasion to say any thing on the other parts of the argument, either upon the subject of abandonment, or whether this was a partial or a total loss.

Posteu to the defendant.

The KING against The Inhabitints of WOODLAND.

THOMAS GUSWELL, Anne his wife, and their two Whether Children were removed by an order of two justices from when the the parish of Ashburton in the county of Devon to the parish of Sessions Woodland state facts Vol. I. M m particularly

from whence they infer fraud, this Court can draw their own conclusion from those facts, without having regard to the adjudication of the court of Sessions. & ?- A fraudulent menting of 10%, per annum will not give a settlement.

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Woodland in the said county. And the Sessions upon appeal confirmed that order, and stated the following case (a):

That the pauper Thomas Gustvell was a day labourer and settled in the parish of Woodland by servitude, and that he went into the parish of Ashburton, where he rented a cot-house at 11. 12s per amum in which he resided. That while he so rented it, on or about October 1782, he took a meadow for one year in the said parish of Woodland, at the rent of ten guinras, of one Mark Northcote who resided in the said parish, and rented this together with other ground of Mrs. Taylor, and paid the poor rates thereof, being by covenant to be reimbur sed by the said Mrs. Taylor. That the pauper did not stock it at all; but at Christmas he let the grass for three guineas to Bdward Barter (without the privity of the said Northcote) until the Lady-day following, who stocked it, and paid the rent to him. That the pauper after that (but not on the same day) paid Northcofe his landlord five guineas for a half year's rent. That there were several persons who offered to take the grass of the pauper before he let it to Barter. That he the pauper laid up the ground for mowing, and then let the shred or mow to the said Murk Northcote for five guineas, and the aftergrass for two guineas. That at the end of the year, when he came to settle accounts with Northcote, the pauper received two guineas on balance of accounts after allowing five guineas to Northcote for the half year's rent then due. That Northcote did not apply to the pauper to take this ground, but that the pauper applied to him, and he readily trusted him. assigning as reasons, that he believed him to be an honest man, though a day labourer, having known him upwards of 20 years; and that he had heard just before he let him the estate that the pauper had received a legacy from a brother-in-law edual to the year's rent. That he (Northcote) had frequently made a practice to take ground and let it out again in parts and parcels. That three years previous to the taking of the above meadow, the pauper applied to the parish officers of Woodland for relief, on account of sickness, and was relieved by them. That about half a year after the expiration of the term for which he took this meadow, his wife applied, and received pay of the parish of Woodland, he then being sick in the Exeter hospital. That he made a fresh agreement for

<sup>(</sup>a) At a former Sessions the evidence of Mark Northcose was rejected; but the Court of King's Bench, being of opinion that his testimony was admissible (b), sent the case down to be restated, and to receive his evidence,

(b) Vide Bell v. Karwoss, page 3 vot 308.

taking another field of Northcote, at 131. per annum, on the 1786. morning of the day when he as examined before the justices touching his settlement. And the Court of Sessions were The King unanimously of opinion that the said taking of the said field was fraudulent

Clapp, in support of the order...... . It has frequently been decided that fraud is a fact, and not an inference of law; and when the justices at the Sessions have expressly found fraud from the evidence, this Court will not draw a different conclusion, even though the case state all the facts particularly. In the case of the King and St. Nicholas in Harwich (a), renting 104 per annum did not gain a settlement, because it was found to be fraudulent. Wright, Justice, said, "The justices adjudged this fraudulent, and the " circumstances vindicate their adjudication; but if the facts "had not vindicated their conclusion, yet unless it had ma-" nifestly and plainly appeared to have been a misconclusion. " I do not see that we could have adjudged it not to be fraudus " lent."

The case of the King and Tedford (b) is very distinguishable from the present. The question before the court was whether the facts found in that case amounted to a purchase under the act of the 9. Geo. 1, or whether the purchase was fraudulently made in order to defeat the act. It was merely aquestion of construction upon that act, and could not be intended to establish as a general principle, that the Court might in all cases draw conclusion of fraud from facts stated. That was held not to be a fraud in point of law; but here if the Court over-rule the decision of the justices, they must find no fraud in point of fact.

But if the Court should be of opinion that they are at liberty to enter, into the fact of whether fraud or no fraud, it appears that the justices were well warranted in drawing the conclusion which they have done. There is a distinction between a statement of facts and of evidence; and the Court have frequently determined that, where the case contains both, they will reject the latter as surplusage, and confine their attention to the former. Now here the only part of the case on which the other side can rely is the evidence of Northcote, the justices could never intend to state Northcote's reasons for letting this tenement as facts, for they could not adjudge it to be a fraudulent taking, when the reasons assigned for such ta17864 against Woon-

LAND.

king, admitting them to be facts, would negative it. This therefore being only evidence must be rejected; and on the The Ki co rest of the case the Court will see no reason to overthrow the decision of the sessions.

> Fanshawe, contra, contended that where the sessions only find fraud generally, this Court is bound by such finding: but whenever the sessions state facts fully and particularly from whence they infer fraud, it is the province of this Court to draw their own conclusion from those facts, without having regard to the adjudication of the Court below (a). And Lee, Justice, in the case of The King and Tedford said, " If this " state of the case contain the whole of the fact, then the ad-"judication of the sessions signifies nothing, if we are of " opinion that the facts are not sufficient to warrant their con-" clusions: for we are to draw a conclusion from the facts. " when we have them clearly before us."

> The only question then is, whether all the facts are fully before the Court? Which must be taken for granted; and if so, whether the Court will not say, that the conclusion which the sessions have drawn is wrong. Whatever might formerly have been the custom, it is the practice of the sessions now to state evidence as well as facts, and this Court will form their judgment from both. Rex and Brompton (b), Rex v. Hoddesden (c), Rex v. Welford (d), Rex v. St. Michael's in Bath (e), and Rex v. Langham (f). Then taking this whole case together, it is impossible to support the decision of the ses-It is stated that this man had credit in the parish for ten guineas per ann. It was so notorious that he was the real tenant, that several persons applied to him to take the winter grass, and one actually took it of him for three guineas, The evidence does not state any conspiracy; it was a fair under-letting, and the mere circumstance of its being underlet affords no presumption of fraud; Rex v. Llandverras (g).

> > Curia adv. vult.

Afterwards, on this day,

WILLES, J. delivered the opinion of the Court; that they gid not think it necessary in this case to give an absolute opinion upon the general question, whether, when the sessions have

<sup>(</sup>a) Burr. S. C. 60. Bots, 364.

<sup>(</sup>b) Cald. 11. (c) Cald. 23.

<sup>(</sup>d) Cald. 57.

<sup>(</sup>e) Gald. 111

<sup>(</sup>f) Cald. 127. (g) Burr. S. C. 571.

have stated all the facts particularly, and drawn a conclusion of fraud from those facts, this Court have a right to examine into the propriety of such conclusion (a); because they were The Kixe all of opinion that the conclusion of the justices upon the facts stated in this case, that it was a fraudulent taking, was right

1786. against Wood

Order of sessions affirmed.

(a) Vide post. 2 vol. 711.

### The KING against MYERS.

Monday, May 29th.

FRSKINE had obtained a rule to shew cause why the de-One who is fendant, who had been convicted in a penalty under the convicted lottery act 22 Geo 3. c. 47. and sent to the house of correction on a penal for want of sufficient distress, should not be discharged out of statute cansustody, because he was apprehended on a Sunday. on a Sunday.

Bearcroft shewed cause (b).

This is a commitment for something prohibited by act of for non-payparliament, and, being so prohibited, it is indictable: this is ment of the therefore a constructive breach of the peace; and then this commitment is like a warrant on an indictment which may be executed on a Sunday.

A person may be taken on a Sunday upon an attachment for non-performance of an award. 1 Atk. 58.

Erskine, in support of the rule.

Though the defendant might have been prosecuted in a criminal manner on this act of parliament, which would have subjected him to be arrested on a Sunday; yet this is a civil proceeding. This is in the nature of a f. fu. when, on a return of nulla bona, the person is liable; for first a warrant is issued to seize the goods of the defendant, and for want of a distress the person is taken.

Under the 29 Car. 2. c. 7. s. 6. no man can be arrested on a Sunday, but for treason, felony, or a breach of the peace: and

this is neither.

Curia adv. vult.

Afterwards on this day,

BULLER, J. said there is no case exactly in point. It is most similar to an action brought for a penalty on the same statute: and it is clear that, upon execution in such an action the defendant could not have been taken on a Sunday. This is to recover a penalty given by the statute; and the effect is equally

(3) On Saturday, May 27 (4:

1986. dyainst Meens Edually the same, whether that penalty is to be recovered in a summary proceeding before a justice, or in an action.

This is not like the case of an attachment mentioned at the That case might have been good law formerly; for then the Court only looked to the contempt: but it has been settled of late years that an attachment for non-performance of an award is only in the nature of a civil execution. That question was much agitated some few years ago, when the Court held that the party being in custody upon an attachment for non-payment of costs was entitled to be discharged under the Lord's act (n).

Per Curiam.

Rule absolute (b).

(a) Comp. 136. See also Bonafous v. Schoole, post. 4 vol. 316; and R. v. Pickerill, Ib. 809.

(b) Vid. Atkinson v. Fameson, post. 5 vol. 25.

May 29th.

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dant; and

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for the

plaintiff;

not be allowed any

eosts upon

the issue

found for

the defendant.

# KIRK against NOWILL and Another.

TO this action of trespass, the defendant pleaded the gene-If plaintiff ral issue, and three special pleas of justification. trial a verdict was given for the plaintiff on the general issue and the two first justifications, and for the defendant on the of which is last justification. In the last term a rule was made to enter up insufficient in law, and judgment for the plaintiff on the general issue, and the two has a verdict first pleas of justification, notwithstanding the verdict for the defendant on the last justification, the same being insufficient in point of law (c).

A rule had been obtained in this term by Chambre to shew cause why the Master in the taxation of costs should not allow such costs only as were incurred upon the issues found for the plaintiff, without allowing to the plaintiff any costs upon the issue found for the defendant.

Wood now shewed cause, and cited Broadbent v. Wilks (d), where, though the trespass was confessed by the plea, the plain? judgment is tiff replied; and issue being joined, a verdict was found for the defendant. Afterwards the Court gave judgment for the still he shall plaintiff, notwithstanding the verdict, and the prothondtary was directed to allow the plaintiff all the costs in the cause. except the costs of trial.

> In the present case the costs of going to trial on this issue were not contended for, but the costs of the pleading. And as the defendant had pleaded an insufficient plea, the plaintiff was entitled to the costs of that plea. If the plaintiff demurred

cither

(c) Ante, 123.

(d) Barnes, 4to. ed. 266.



Kirk agains NowLL

either to the plea or to the rejoinder and had judgment, he

was envitted to the costs; and it was immaterial in what stage of the cause the plaintiff bave judgment.

Holles, J. All the late cases are decidedly against the plaintiff. Suppose the judgment had been arrested, no costs would have been given. The reason is obvious; the plaintiff has contributed to the costs as well as the defendant. He should have demurred to the defendant's plas; and by going on to trial he is equally in fault (a).

Per Gurjam,

(b) Rule absolute.

(a) Vid. Haukey v. Smith, post. 3 vol. 507. (6) Vide 2 Vehtr. 196. 1 Barnes, 410 edit. 125.

## PRAY and Others against EDIE.

Monday, May 29th.

ILSG V had obtained a rule on a former day to shew if the plain-cause why the proceedings in this cause should not be abroad, the stayed, till the plaintiff, who resided at Georgia in North-Ame-court will rica, gave security for the costs, in case a verdict was given stay proceedings till against him.

Law, for the plaintiff, now contended that such a rule had curity for never been granted but under very particular circumstances the coststo induce the Court to grant it; and he cited 2 Burr. 1026. 4

Burr. 2105. & Cowp. 158.

Buller, J. There have been several late cases to the contrary; and for this reason, that if a verdict be given against the plaintiff he is not within the reach of our law so as to have process served upon him for the costs.

Per Curiam.

(c) Rule absolute.

(c) Post. 362. S. P. where the plaintiff resided in Ireland. But a different practice prevails in C. B, unless the plaintiff go abroad to avoid paying his debth, of the like. H. Bl. Rep C. B. 106.

#### FENNER against EVANS.

Monday. May 29th.

A scire faci-N annuity had been granted by the plaintiff to the de. a judgment A fendant before the passing of the act of the 17 Geo. 3. entered on a c. 26. the consideration of which was inrolled in the memo-bond secutial to be 1000l, but in fact the plaintiff had received only ring an an-700% in money, and a respondentia bond for 271%; and there ed before the was a deduction of 291. for law charges.

17 Geo. 3. c. A sci. fa. had issued since the annuity act to revive the 26 is an acjudgment, and execution had been taken out upon it. tion within

the second Mingay section of that statute.

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FENNER againm EVANS. Mingay and Chambre, now shewed cause against a rule which had been obtained to set aside the scire facias, and all the subsequent proceedings, because the real consideration of the annuity did not appear on the memorial. They contended that as the annuity was granted before the passing of the annuity act, the grantee was only obliged (a) to enter a memorial before execution was taken out. This rule therefore, which was intended to set aside the scire facias as well as the execution, must be discharged.

Erskine and Garrow, contra, insisted that, as the real consideration of the annuity did not appear on the memorial, the grantor was entitled to some relief under the annuity act. But as the judgment itself was regular (it having been obtained before the passing of this act) they had only made application to the Court to prevent a revival of that judgment, by setting aside the scire facias. For any proceeding to revive a judgment, on an annuity, granted before the passing of that statute, was as much within the words and meaning of the act; as any deed or instrument for securing an annuity granted subsequent to it.

WILLES, J. This is a proceeding within the intent and meaning of the act; therefore the rule must be made absolute.

ASHHURST, J. The execution must certainly be set asidea and the only question is as to the scire facias: but a scire facias is an action; and then this comes within the second section of the act, for the words are "that no action shall be "brought on any such judgment already entered, &c. The scire facias therefore as well as the execution must be set aside,

BULLER, J. There is no doubt but that a scire facias is an action: and on that ground it has been held that a plea to scire facias must conclude, "if the plaintiff ought to have of maintain his action (b),"

Per Curiam,

(c) Rule absolute.

(a) Vide sec. 2. (b) 2 Wile. 251. (c) Vide 2 Bl. Rep. 1227. 2 Ld. Raym. 1048. 1253. post. 2 vol. 46.

May 27th. Memora noun. In this Term George Bond Esquire of the Middle Temple was called to the degree of Serjeant at Law, and gave rings with this motto; "Hareditas a legibus."

BND OF EASTER TERM.

#### ARGUED AND DETERMINED

IN. THE

# COURT OF KING'S BENCH.

TRINITY TERM,

IN THE TWENTY-SIXTH YEAR OF THE REIGN OF GEORGE III.

SMITH and another against NISSEN and another.

Fune 16th

THIS was an action for money paid, laid out, and expend-upon a reed, tried before Buller J. at the sittings after last Easter quest to A. Term, at Guildhall, when a verdict was found for the plain- to accept a bill, and tiffs. The circumstances were these-One Taubert sent an draw upon order to the defendants for goods, and desired that they B. for the would draw a bill on the plaintiffs for the value, which the like sum, defendants accordingly did, after they had sent the goods, the mere act The plaintiffs in a letter written to the defendants on the 23d upon B. September said that they could not accept the bill on account does not aof Taubert at present, because they (the defendants) had mount to an sent a larger quantity of goods than were ordered; adding, that they had written to Taubert for further directions. days afterwards the defendants wrote to the plaintiffs, pressing that the bill might be taken up; and on the 28th of the same month received for answer, that the plaintiffs had written to Taubert, and were waiting for his answer before they could accept; and that they had desired the holder to keep the bill in the mean time. On the 14th October Taubert in a letter to the plaintiffs, took notice that the orders had been exceeded, but desired that they would accept the bill, and draw Yor. I. upon

1786. SMITH against NISSEN. upon Govertz at Hamburgh, for the amount; in consequence of which the plaintiffs drew on Govertz, who refused to accept; and afterwards the plaintiffs paid the bill for the honor of the drawer; to recover back the amount of which this action was brought.

Wilson now moved for a rule to shew cause why the verdict which had been given for the plaintiffs should not be set aside, and a verdict entered for the defendants, upon the ground that the plaintiffs had actually accepted the bill drawn upon them. He admitted that, notwithstanding Toubert's lefter, the plaintiffs might have chosen whether they would accept or not: but he contended, that they had only a right to draw on Govertz upon condition that they themselves should accept the bill drawn upon them, and therefore that their drawing upon Govertz was an implied acceptance of that bill. But

The Court held that what the plaintiffs had done, did not amount to an acceptance, for they never meant to make themselves liable unless the bill drawn upon Govertz was accepted and paid; and they would not imply a contract which the

parties themselves had refused to enter into.

Rule refused.

Monday. June 19th. OSWALD and Others, Executors of OSWALD against LEGH.

Twenty years without any demand is of itself a presurprition. that a bond has been Sir. 826, 827.

EBT on bond by the executors of the obligee against .the obligor شمر Pleas-non est factum; solvit ad diem; & solvit post diem. This cause was tried at the sittings after last Easter Term before Buller J. at Guildhall, when it appeared that the bond was executed on the 17th January 1763. That in June 1784 the obligee sued out a writ upon the bond, paid. Vid 2 but he died within three months afterwards, without having That the present action was commenced last ever served it. That the parties were both men of fortune, Easter Term. residing in England, and had lived upon terms of intimacy. The jury found a verdict for the plaintiffs.

Bower moved for a rule to shew cause why there should not be a new trial on the ground that the jury should have been directed to find for the defendant, on the presumption of the bond's having been satisfied; as the parties had lived in the

kingdom.

1786.

OSWALD

against

kingdom, and no demand had been made for nineteen years and an half. That in some cases this presumption had arisen where demand had not been made even for a less time. In an action of debt on a bond by Kowley against Tomkins (a), Aston J. mentioned the case of Weldon v. Davis at Guildhall, after Trinity 1760, which he said he had often heard cited by Lord Mansfield, where eighteen years were held sufficient to raise a presumption upon, unless some reason was assigned for not calling on the party. In that case the case of Moyle against Lord Roberts was cited; where the plaintiff, in order to obviate the presumption, shewed two writs of testatim capias to have been sued out, but not served, because the party could not be found; in which last case Lord Mansfield said there was no foundation for the presumption.

BULLER, J.—I have always been of opinion that no less time than twenty years could of itself form a presumption that a bond had been paid; and as there was no evidence at the trial in aid of the presumption, I left the question to the jury, with strong directions in favour of the plaintiff. For even with regard to the rule of twenty years, where no demand has been made during that time, that is only a circumstance for the jury to found a presumption upon, and is in itself no legal bar. In those cases where satisfaction of a bond has been presumed within a less period, some other evidence has been given in favour of such a presumption; such as having settled an account in the intermediate time, without any

It is manifest that this doctrine of twenty years presumption was first taken up by Lord Hale, who only thought it a circumstance from whence a jury might presume payment. In this he was followed by Lord Holt, who held that if a bond be of twenty years standing, and no demand proved thereon, or good cause of so long forbearance shewn, on solvit ad diem he should intend it paid (b). This doctrine was afterwards adopted by Lord Raymond in the case of Constable v. Somerset (c). That was debt upon bond, where the defendant, an executor, craved over of the bond, and of the condition, which appeared to be for the payment of so much money six months after the death of the defendant's testator. The defendant in his plea averred that the testator died on

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<sup>(</sup>a) Salop Summer assizes 1766. (b) 6 Mod. 22. (c) Hil. 1 Geo. 2, at Guildball.

Q.WALD against

LEGH.

the 15th March 1711, and that he had paid the said sum on the 16th March 1711, within six months after the testator's

death, and thereupon issue was joined.

The defendant relied on the ground that, as he, after the death of the testator his father, had an estate in the plaintiff's neighbourhood, and was constant and regular in all his payments, it should be presumed that the money was paid to the plaintiff. In answer to this objection evidence was given of a demand of the money on the defendant himself in 1725; and the Chief Justice said, that the presumption of money having been paid which was due on bond, if it were put in suit after 20 years standing, was not the old but a new doctrine, which had been introduced in Lord Hale's time; and that he would never suffer a plaintiff to be stripped of a just debt by such a presumption as was then contended for.

This opinion seems to fortify the idea which I took up at the trial, in answer to a dictum which was then cited (a), that the question of presumption of payment within a less time than twenty years had been left to a jury, which was, that it must have been left to them upon some evidence; and in such cases the slightest evidence is sufficient. In one of the Winchelsea cases (b), Lord Mansfield expressly said, that if a bond had lain dormant for twenty years, it shall be presu-

med to be paid.

The Court, however, inclining to believe that the real truth of the case was with the defendant, desired that he would make an affidavit, which being read upon a subsequent day. and not proving satisfactory, they

Discharged the Rule.

And Lord Mansfield, Ch. J.—said, that there was a distinction between length of time as a bar, and where it was only evidence of it: the former was positive, the latter only presumption; and he believed that in the case of a bond no positive time had been expressly laid down by the Court; that it might be eighteen or nineteen years.

TOPPING

(a) 1 Burr. 134

(6) 4 Burr. 1963.

#### TOPPING against RYAN.

1786. Tuesday, Yune 20th.

DEBT on a judgment. The defendant pleaded that he the said defendant, be- A supersefore and at the time of the reddition of the judgment afore-deas obtainsaid, in the said court of our said lord the king, before the judgment king himself, was and remained a prisoner in the custody of cannot be the marshal of the marshalsea of our said lord the king, he-pleaded in fore the king himself, at the suit of the said plaintiff in the tion on such said action. And the said defendant in fact further saith, judgment, that after the reddition of the last mentioned judgment, to wit, Ante 227. on the 16th day of May 1786, he the said defendant was superseded and discharged out of such custody by the said court of our said lord the king, before the king himself, to wit, at Westminster in the county of Middlesex aforesaid; and this he the said defendant is ready to verify; wherefore he prays judgment if the said plaintiff ought to have execution upon any judgment to be recovered in this action against the person of him the said defendant, &c.

To this plea there was a general demurrer, and joinder in demurrer.

Wood was to have argued in support of the demurrer, but

the Court desired to hear the other side.

6ible against the demurrer. The defendant ha

superseded after judgment recovered against him, cannot be taken in execution in that action; and the distinction has been taken between those cases where a person has been superseded before judgment when he may be afterwards charged in execution, and those where he has been superseded after judgment, in which cases he is not liable to be taken again. Wright administrator v. Kerswill, Barnes 376. As the defendant therefore could not be directly taken in execution upon the judgment, it would be unreasonable that he should be made liable by circuity.

WILLES, J. This is a new action; and the supersedeas

in a former one, is no bar to this.

BULLER, J. This is a legal demand; and the only question is, whether this bar set up by the defendant is known to the common law. If it be a bar at all, it is a bar to the whole

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1786. TOPPING against KYAN.

demand. But any exemption in favour of the debtor's person can only arise in those instances where the Legislature has expressly made it, as in the case of a debtor who is discharged under an insolvent act; for no such partial bar exists by the common law.

Tudgment for the plaintiff.

### BROWN against DICKSON.

Tuenlay, Fune 20th.

Wherever the same the same judgment ration.

HE first count of this declaration was trover for a dog. The second and third were as follows: And whereas plea may be also afterwards, to wit, on the same day and year aforesaid, pleaded and at Morpeth aforesaid, in the county of Northumberland aforesaid, the said John Brown, at the request of the said John given on se. Dixon, delivered to the said John Dixon a certain other spaveral counts, niel of him the said John Brown, of a great price, to wit, they may be of the price of 30k to be seen and viewed by the said John joined in the Dixon, and to be returned by him in a reasonable time to the said John Brown; yet the said John Dixon, contriving and wrongfully intending to deceive, defraud, and injure the said fohn Brown in this behalf, did not return the last mentioned spaniel to the said John Brown in a reasonable time, or at any time hitherto; but afterwards, to wit, on the same day and year aforesaid, at Morpeth aforesaid, without the leave and against the will of the said John Brown, took and carried a-way the last mentioned spaniel to places unknown to the said John Brown, and kept and detained the same from the said John Brown for a long and unreasonable time, and until the said John Dixon afterwards, to wit, on the 1st day of October, in the year aforesaid, by and through his great negligence and carelessness in that behalf, lost the said last mentioned spaniel, to wit, at Morpeth aforesaid, and the same has never hitherto come to the hands or possession of the said John Brown, but as to him is entirely lost. And whereas also on the said 1st day of August, in the year aforesaid, at Morpeth aforesaid, the said John Brown, at the request of the said John Dixon, lent and delivered to the said John Dixon, for the use of the said John Dixon, a certain other spaniel of the said John Brown, of a great price, to wit, of the price of other 30l. he the said John Dixon contriving and wrongfully intending to injure and deceive the said John Brown in this behalf, hath not re-delivered the last mentioned spaniel to the said said John Brown, although he the said John Dixon afterwards, to wit, on &c. at &c. was requested by the said John Brown so to do; but on the contrary thereof has hitherto wholly neglected so to do; and took such little and such bad care of the last mentioned spaniel, that the same, by and through the mere negligence and carelessness of the said John Dixon in this behalf, is totally lost to the said John Brown, and has never come again to his hands or possession; to the damage

BROWN against DIXOX.

of the said John Brown, &c. Special demurrer, for that in and by the said declaration, in the first count thereof, the said John Brown hath declared and complained against the said John Dixon in a plea of trespass on the case for a certain supposed wrongful conversion and disposal of the said spaniel and setting-dog therein-mentioned of the said John Brown, to the use of him the said John Dixon, and yet in the second and last counts of the said declaration, the said John Brown hath declared against the said John Dixon, in the above suit, in an action on the case, for supposed breaches of express or implied promises, in not returning and re-delivering certain spaniels therein respectively mentioned, supposed to be lent and delivered by the said John Brown to the said John Dixon, and not for any supposed wrongful conversion and disposal thereof. for that there are in the said declaration pretended causes of action, different in their natures, comprehended and included in the same declaration, to wit, a pretended cause of action, founded on a supposed wrongful conversion and disposal of a spaniel and setting-dog of the said John Brown, and pretended causes of action, grounded on promises, which are incompatible with each other, and ought not to be joined in the same declaration. And also for that causes of action founded on supposed wilful and determined wrongs and injuries ought not to and cannot be blended and included in one and the same declaration with causes of action founded on contract, or on negligence, inadvertence, or carelessness. And also for that the said declaration is in other respects defective, insufficient, informal, &c.

Manley, in support of the demurrer.

As it is clear that assumpsit and tort cannot be joined in the same declaration; the question is, whether either the second or the third count in this declaration be founded on a contract? If so, they cannot stand with the first. There is a difference between nonfeazance and misfeazance; the former is neglecting to do that which a person has either expressly or impliedly

Brown against Dixon.

pliedly undertaken to do; the latter is the act of doing something in a different manner from that in which the party is bound, either by law or by his own contract, to do, and is a tort. But as the former is only an omission, the proper remedy is by an action on the case. 5 Burr. 2827. This therefore is not like the case in Wilson (a), where it was held that misfeazance and negligence might be joined with trover, because this is nonfeazance. The premises and the breach of the second count are in assumpsit; and that which follows is only matter of aggravation.

In the case of Beningsage v. Ralphson (b) one count in assumpsit to deliver merchantable commodities, and that he delivered dirty ashes instead of them, was joined with another on a warranty; and on demurrer there was a judgment for

the defendant.

An action on the case against a carrier cannot be joined

with trover in the same declaration (c).

In White and Rysden (d), where the declaration was founded partly on a contract and partly on a tort, Lord Hobart said, that if the defendant had demurred, the declaration could

not have been supported.

In deciding whether two counts can be joined, it is not the true way of considering, whether the same judgment can be given on both. That rule cannot hold in the extent to which it has been attempted to be carried. For in all cases of assumpsit the judgment is for damages; but trover is for damages, which certainly cannot be joined.

In the present case, the amount of the breach in the second count is, that the defendant has not re-delivered the dog,

which implies an assumpsit.

Gibbs, contra, was stopped by the Court.

BULLER, J.—Perhaps the rule of judging whether two counts can be joined, by considering whether the same judgment can be given on both, is not true in its extent; but by adding another requisite it is universally true. For wherever the same plea may be pleaded, and the same judgment given on two counts, they may be joined in the same declaration. Assumpsit and tort cannot be joined together, because the pleas to both are not the same. But the whole of this is case; the same plea of not guilty goes to the whole declaration; and the Court may give the same judgment on the whole.

This

(a) 2 Wile. 319. (b) 2 Show. 250. (c) 1 Sid. 244. (d) Gra. Gar. 20.

This is not to be distinguished from the case of Dickon v.

Clifton in the Common Pleas (a):

The common way of declaring against a carrier now is in msumpsit, to which trover cannot be joined; but if the plaintiff declare on the custom of the realm, a count in trover may be joined; it only depends on the form of the action. Iudgment for the plaintiff. (b).

1786. Brown againet Dixor.

(a) 2 Wils. 319. (b) Vid. Huncock v. Heywood, post. 3 vol. 433? Jenninge v. Newman ; p. 4 vol. 347 ; & Elsee v. Gatward; p. 5 vol. 143.

# DUCKER against WOOD:

Tuesday, Fune 20th.

CTION of assault. Verdict for 1501: The court Mingay moved to set it aside on account of excessive may in any damages.

Lord Mansfield said, there was no doubt but that the Court on the ground had the power of taking the opinion of a second jury in any of excessive. case where the damages were excessive; but that all these damages. questions depended on their own circumstances, on which the Court would exercise their discretion.

But in this case, upon hearing the report of the judge, the

Court thought fit to reject the motion (a).

(a) Vide 2 Wils. 405. and 3 Wils. 62; Duberley v. Gunning; post. 4 vol. 651; and the cases there cited; and Jones v. Sparrow, post. 5 vol. 257.

# JENNINGS and Others against WEBB:

Wednesday June 21st.

BALDWIN shewed cause against a rule for setting aside The four the judgment in this cause for irregularity, with costs.

The declaration was delivered on the 16th day of May and for pleading on the 20th the defendant pleaded in abatement. This he are both incontended was too late; for as the four days, which are al-clusive. lowed to plead in abatement, are both inclusive, the time of pleading such a plea expired on the 19th.

Russel, in support of the rule; insisted that the four days were not both inclusive in this court. According to the generai practice of this court, whenever a certain number of days is allowed for pleading, or otherwise, one of them is taken exclusive; and there is no reason for forming an exception in this particular instance. In the case of Long and Miller (a), the rule which was given on the 7th of May expired on the Vol. L Tith?

days allowed

(4) 2 Stra. 1192.

against WEBB.

11th, which shows that this court reckoned one of the four days which the defendant is allowed to plead in abatement, JENNINGS exclusive. In some instances, the party has even more than four days to plead in abatement; as where the declaration is delivered within the last four days of the term preceding, and there is a special imparlance.

The Court thought this question must have been settled: and desired it to stand over, that they might have an opportunity

of enquiring into it. And the next day

BULLER, J. read the following note of Gawler one. &c. v. Hendy one, &c. (a). The plaintiff and the defendant were both attornies in the Court of King's Bench; and the plaintiff sued the defendant by attachment of privilege, and arrested and held him to bail. On the 8th of May a declaration was delivered; and on the 11th, at eleven o'clock at night, a plea in abatement of privilege was delivered at the plaintiff's house. which the next day he objected to, and demanded a plea in the common form; and, as soon as the time was expired, signed judgment. Willes moved to set aside the judgment with costs for irregularity; insisting that the plea in abatement was well delivered, and that the defendant had all the day of the 12th of May to deliver it. E contra, it was insisted that such a plea could not be delivered after the 11th; for that, in cases of pleas in abatement, the four days were reckoned inclusive; and that the defendant ought to deliver it at a reasonable time in the evening, and not at midnight. In many cases the courts have held nine o'clock late enough for the delivery of pleads ings or other proceedings. Willes, J. concurred in both these objections. And on the Master's telling Lord Mansfield that the plea was irregular in another respect, viz. being delivered, whereas it ought to have been filed; The Court rejected the motion made by the defendant, and the judgment stood.

And also the following one taken by the late Master Owers. -Every plea to the jurisdiction of the court, or in abatement, must be pleaded before the rule for pleading is out, and cannot be pleaded after an imparlance (b), unless the declaration be delivered so late in term that the defendant is not bound to plead to it in that term, or is delivered after term; in both which cases the defendant may, within the first four days inclusive of the subsequent term, plead any plea in abstement. QE.

(a) B. 15 G 3. B. R.

<sup>(</sup>b) Vid. Doughty v. Lascelles, post. 4 vol. 520.

1786.

ugainst

er to the jurisdiction, as of the precedent term, whether a

rule be given or not, and Sunday is (a) one.

And the Court were of opinion that, All pleas to the juris- Jav. 1 os diction, and in abatement, being dilatory, ought not to be favoured; and that the four days allowed for pleading them are Rule discharged. both to be reckoned inclusive (b).

But the defendant had leave to plead the general issue, on

payment of costs.

(e) Unless Sunday be the last of the 4 days. Lee v. Carlton, p. 3 vol. 642; and Solomens v. Freeman, post. 4 vol. 557.

(b) In Roberts v. Williams, M. 22 Geo. 3 B. R. Buller, J. said, The four days to plead in abatement are both inclusive Harbord v. Perigal, p. 5 vol. 210. S. P.

#### IAQUES against NIXON.

Thursday June 22d.

N action of trover for goods had been brought in order Bail in error to try the validity of a commission of bankrupt, which must be put in within had issued against the plaintiff. The cause was tried on the four (a) days 25th May, and a verdict given for the plaintiff, with nominal after final damages of one shilling. A writ of error was sued out and judgment allowed on the 31st of May; and on the same day a copy of signed, without out reference the allowance was served on the plaintiff's attorney. Final to the time judgment was signed on the 14th June, and execution sued of the allow-out on the same day; within four days after which bail in er. mice, or ser-ving the cofor was put in.

The question was, whether the allowance of the writ of er-service of

ror, and the service of it, was a supersedeas?

the allow-Bearcroft shewed cause against a rule which had been ob- ance is only tained for setting aside the execution; and contended that it party into was an universal rule that the allowance of a writ of error, contempt if after verdict, did not operate as a supersedeas, unless bail was he proceed; put in within four days afterwards. In the case of Betts dem. lowance is Robson v. Egerton (c), in ejectment, which was similar to the of itself a present, the Court said that a writ of error was no supersedeas supersedeas without bail. That whatever irregularity there had been on (b). the present occasion, it had originated with the defendant, who had sued out the writ of error too soon before the signing of the final judgment; for he might either have applied to a judge, or to the court, to specify the sum for which bail should be given.

Mingay,

(c) Barn. 212. 2 Gro. Prac. 353.

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<sup>(</sup>a) Those four days are exclusive. Bennet v. Nicholls, post. 4 vol. 121. (b) It is not a supersedeas from the sealing, but from the delivery to the clerk of the errors, 2 Barn, 164, 170.

JAQUES against Nixon.

Mingay, contra, said, that this was very distinguishable from the case in Barnes, for there, no bail whatever was put in; here, bail was put in the moment that final judgment was signed; they could not have been put in before, and therefore the defendant had not been guilty of any neglect. This point was expressly decided in Michaelmas Term last, in the case

of Doe dem. Clay and another v. Bracebridge (a).

Buller, J. The opinion of the Court in the ejectment case in the Common Pleas is not applicable to any other case; for in ejectment (b) the defendant himself is to enter into a recognizance in such reasonable sum as the Court, to which such writ of error is directed, may think fit. As to the practice which has obtained in suing out a writ of error before judgment signed, it happens in almost all cases that the writ is sued out before judgment is actually signed; because otherwise execution would issue instantly. And the Court have gone so far, that, if a writ of error be sued out, and the plaintiff will not sign judgment till after the return of the writ, in order to avoid the effect of it, and then sues out execution, the Court will set aside the execution (c).

Then as to the next point; the allowance of a writ of error in the general course of practice is not served till final judgment is actually signed; and the words of the rule apply to that. The rule requires bail to be put in within four days after the allowance; but there is no opportunity of putting in

bail before judgment is signed.

As to the defendant's being too soon in serving the copy of the allowance it makes no difference, for it only operates as an allowance from the time of signing judgment: and that was what the Court said in the case cited of Michaelmas Term last. The service of the allowance is only material to bring the party into contempt, if he proceed to sue out execution afterwards; for the allowance of the writ of error is of itself a supersedeas.

Rule absolute.

The

(b) See 16 and 17 Car. 2. c. 8. § 3. (c) Vid. Barnes, 260.

<sup>(</sup>a) In that case Cowper moved to set aside a fieri facias, which had been sued out on the ground that bail had not been put in within four days after a writ of error bad been allowed. He contended that though a writ of error may be allowed before, it could have no effect till the judgment is actually signed: and that the party is allowed four days after the signing of the judgment to put in bail; for before the judgment no bail can possibly justify. And the court agreeing that such was the practice, the rule was made absolute.

## The KING against The Inhabitants of SANDFORD.

1786.
Thursday,
June 22d.

PY an order of two justices, William Webber, Ann his When inwife, and their three children, were removed from the dentures of parish of Sandford, in the county of Devon, to the parish of ship still Bishopstawton in the said county. The sessions, on appeal, subsist in quashed that order, and stated the following case:

That the pauper was legally settled in the parish of Bish- and the pauopstawton by birth, and was bound an apprentice by the offied another cers of that parish, at the age of eleven years, to serve Ed-master unmund Sage of that place, till twenty-four. That he lived with der the idea that they the said Edmund Sage for five years, when his master gave were relin-him up his indenture, and recommended him to live with William quished, no Verney of the parish of Chittlehampton, Thatcher, with whom settlement is the apprentice made an agreement as a servant for three years, thereby, ei-That while he was with Verney, Sage had a conversation with ther as an Verney, and desired him to keep back some of the pauper's apprentice, wages to provide him with clothes; apprehending that other-or as an hirwise he would come upon him. That, about the expiration And in order of that time he returned to the parish of Bishopstawton, to give the (where his master Edmund Sage then resided) and lived there apprentice a with one Toyte, a butcher, with his master's knowledge, who in a different frequently conversed with the said Toyte while the pauper parish, by lived with him, but not upon the subject of his apprenticeship. serving an-That after the pauper had lived with Toyte three months, he other master there must came back to Sage's house, and lived with him for a month, pay be an exing his master sixpence per week for his lodgings.

Clapp, in support of the order of sessions, acknowledged sent of the that the pauper was not sui juris at the time of entering into master to the contract with Verney; because in order to cancel the in-the particudentures, the consent of the parish officers was necessary, the lar service; pauper being under age. But he contended that the pauper and a mere had served Verney in the parish of Chittlehampton with the recommendation is not consent and approbation of his former master; so that it was sufficient. a service under the indentures; and then forty days residence. In the case gained him a settlement; and this consent of the original prentice, the master was confirmed by his subsequent conversation with latter part of Verney respecting the pauper's clothes. Then the question is, the service whether he gained a subsequent settlement in Bishopstawton? may be jointly if it be contended that he did, it must be on one of these two mer, not-grounds: 1st, By serving Toyte for three months with the withstand.

hs with the withstandknowledge ing any intervening

settlement

(a).

(a) R. v . The Inhabitants of Brightelmston, post. 5 vol. 188, S. P.

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knowledge of Sage his original master. But in order to gain

a settlement under indentures of apprenticeship by serving a The Kino second master, it is necessary to have the express consent of the first; and it has been determined that mere knowledge does not necessarily imply a consent. Rex v. St. Luke's (a). Rex v. Austrey (b), and Rex v. Ideford (c). 2dly, It may be contended that by coupling the last month which he served with Sage with the five first years in Bishopstawton, the pauper gained a settlement there. But it has never yet been determined that, in case of an apprentice, the latter part of his service may be coupled with the former, to the prejudice of any intervening settlement. There is no such analogy between the case of an apprentice and that of a servant, as that whatever is applicable to the one should apply also to the other. Before any question can be decided merely by analogy, the circumstances of both ought to be precisely the same, or at least the principle by which the decision is to be guided: here neither is alike. In the first case the nature of the contracts under which they served are very distinct, both with regard to the length of time, and the manner of contract-Next as to the principle, it is clear that the two cases are not governed by the same rules; the legislature has considered then in distinct lights, for they have pointed out different ways by which each of these persons may gain a settlement. In the one case, under indentures of apprenticeship, forty days residence is sufficient; in the other case, there must be a hiring and service for a whole year. And though it was determined in the case of the King and Lowest (d), and the King and Hulland (e), that, where a servant had resided part of the year in one parish, and part in another, at different times, making when added together, more than forty days in each, his settlement was in the parish where he slept the last night, yet the last day's service was absolutely requisite to give any settlement at all; the Court were obliged to have recourse to such a circumstance to guide its decision, and the last day's service was selected merely on that account. It was necessary that the pauper should be settled in one or other of those parishes, he having no other place of settlement. But in the present case, an intervening settlement was gained at Chittlehampton; and therefore the grounds of those decisions are not applicable, nor were meant to be laid

<sup>(</sup>a) Burr Set. Cas. 542. (d) Ibid. 825.

<sup>(</sup>b) Ibid. 441. (c) Ibid. 821.

laid down as general principles of law, which were to govern other cases than those under similar circumstances.

The case of the King and Fremington (a) is decisive; there The K, we the apprentice gained a settlement by serving forty days in a gaine different parish, with the consent of the master, even though she returned to her original master, and served the last eight days with him.

Fanshaw in support of the rule. The question of alternate residence did not arise in the case of the King and Frem-

ington.

In this case, after the indentures were delivered up, none of the subsequent services are to be considered as under them, and consequently the pauper was settled with his original master. In the case of the King and St. Luke, the indentures were not actually delivered up; and though what passed amounted to a total abandonment of them as between the parties, yet the apprentice did not gain a settlement in another parish by serving a new master; because there was no assignment of the indenture, or consent of the original master. So in the case of the King and Austrey, it was not a service under the indentures, on account of the intention of the parties. however mistaken. These authorities are in point, and prove that the services subsequent to that of the first five years cannot be considered as services under the indentures, but merely in the capacity of a menial servant. He then cited 6 *Mod*. 69.

adly. If the Court should be of opinion that the indentures existed during the whole period; then if any of the services continued under them, they all did, and if so, the pauper is settled in the last place of residence. So that, taking it either way, the settlement was gained in Bishopstawton; and there is no difference in this respect between the rules relating to apprentices and those of menial servants. The Legislature has classed them together in the 13 & 14 Car. 2. c. 12. s. 1. menial servant gains a settlement in the place where he lodges; so that the settlement is gained by his residence. The same rule applies to an apprentice; and in neither case need the forty days' residence be successive. Each has the settlement as a reward for his services. As to the necessity which it is said guided the Court in the cases of the King and Hulland. and the King and Lowess, the Court did not determine them on

(a) Burr. Set. Ges. 416.

SANDTORD.

on that ground; but they meant to lay down a rule upon the circumstance of the alternate residence.

The King Lord Mansfield, Ch. J.

against It seems to me clear that the

It seems to me clear that the pauper could not gain a settlement, after the first five years, under the indentures as an apprentice; because neither party in fact considered the service as such; they considered the indentures as given up, and put an end to for ever: so that the service was not, nor was intended to be, in the capacity of an apprentice. Neither did the pauper gain a settlement as a servant; because there could not be such a service in point of law during the existence of the indentures. So that though in reality there was a service in point of fact, yet it cannot be applied to the purpose of gaining a settlement, because in point of law the indentures still subsisted.

WILLES, J. I am of opinion with Mr. Fanshaw on both points. The pauper could not gain a settlement in Chittle-hampton, because the apprenticeship was not dissolved; for being a minor, he could not agree to the discharge of the indentures without the consent of the parish officers. And as to the other point, it was determined in the King and Lowess, and in the King and Hulland, that the latter part of the ser-

vice may be joined to the former.

Ashhurst, J. In the case of the King v. Fremington, the question of alternate residence was not entered into. Setting that point therefore out of the question, the service in this case with the second master in Chittlehampton cannot give the pauper a settlement; because the indentures of apprenticeship were not dissolved in point of law: and therefore, though the parties acted under a mistake of the law, yet, as it was not in fact intended between them that the pauper should serve under the indentures, we cannot so consider it. And on the other hand, he cannot be considered as serving under a hiring, because the indentures still subsisted in point of law.

Buller, J. The case does not come up to the fact which the counsel supposed; for it is manifest that, when the indentures were given up by the master to the apprentice, he was left at liberty to do whatever he pleased. It is true that the master recommended him to another person, but it was a mere recommendation, which the pauper might have rejected or not, as he pleased. He might have gone into the service of any

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other master. His first master made no particular agreement In the same manner, the other hiring and serwith Verneu. vice was without the consent and concurrence of the original The KING master; during the whole period the apprentice was at liberty to have hired himself to whom he pleased. The fact therefore of consent to any particular service by no means appears. On the other hand the pauper being under age could not consent to cancel the indentures, so that though there was a service in fact, yet in point of law, no settlement could be gained under it.

I also agree with my brother Willes, that the settlement was in Bishopstawton, upon the second ground, that the latter part

of the service is to be connected with the former.

Order of Sessions quashed. Original Order affirmed.

## BIZE against DICKASON and Another, Assignees of BARTENSHLAG.

THIS was an action for money had and received by the Where a defendants, as assignees of the bankrupt, for the plain-bankrupt tiff's use. Plea, the general issue.

The cause came on to be tried at the sittings after Easter policy to a Term 1786, at Guildhall, London, before Buller, Justice, when broker actthe jury found a verdict for the plaintiff; damages 6611. 9s. commission

following case:

That the bankrupt John Rodolph Bartenshlag, being an un-upon the derwriter, subscribed policies filled up with the plaintiff's pens before, name for his foreign correspondents, who were unknown to but is not the bankrupt.

e bankrupt.

That losses happened on such policies to the amount of bankruptey, 655L 9s. 7d. before the bankruptcy of Burtenshlug, and were ad-the broker justed by him. That a loss on another policy to the amount may deduce of 61. Os. 3d. happened before the said bankruptcy, but was not the amount adjusted till after such bankruptcy.

That the plaintiff paid the amount of the logue to his fo-debt which

reign correspondents after such bankruptcy.

That the plaintiff had a commission del credere from his the estate of the bankcorrespondents; was made debtor by the bankrupt for the pre-rupt; and if miums; and always retained the policies in his hands.

Vol. I.

That he pay all that is due

to the assig-

nees, without deducting such money, he may recover it from the assignees as money had and received to his use.

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written a

10d. and costs 40s. subject to the opinion of the Court on the del credere, and a loss

adjusted till

of the loss

from the

he owes to

by mistake,

Bize against Bickason

That a dividend of 10s. in the pound was declared under the said commission on the 18th of June 1782.

That at the time of the bankruptcy there was due from the plaintiff to the bankrupt the sum of 1356l. Os. 3d. And there was due from the bankrupt for the above losses 66th 9s. 10d.

That on the 15th March 1782, the plaintiff paid to the desfendants the sum of 750L and on the 17th November 1765, the further sum of 606L Os. 3d. amounting to 1356L Os. Sd.

And on the 18th November 1785, the plaintiff proved the

said sum of 6611. 9s. 10d. under the said commission.

That the plaintiff never received any dividend under the commission for or on account of the said losses.

That a final dividend of the effects of the said bankrupt was declared by the said commissioners on the 24th day of

January 1786.

That on the 1st of February 1786, previous to such dividend being paid, the plaintiff caused a notice to be served on the defendants, purporting that he had paid them the said sum of 1356l. Os. 3d. under a mistaken idea, without deducting therefrom the said 661l. 9s. 10d. for the aforesaid losses on the said several policies, subscribed by the bankrupt, for whom he was del credere to the said foreign correspondents, and had paid such losses accordingly; and cautioning them against making any dividend until he was paid the said sum of 661L 9s. 10d.

That there is now in the hands of the said defendants effects of the bankrupt more than sufficient to satisfy the de-

mand of the plaintiff.

The question for the opinion of the Court is, Whether the plaintiff is entitled to recover in this action? If the plaintiff is entitled to recover in this action, the verdict to stand. But if the Court shall be of opinion, that the plaintiff is not entitled to recover, then a verdict to be entered for the defendants.

Smith was to have argued for the plaintiff, but Mingay for

the defendants declined arguing the case.

The Court being of opinion that it came within the princi-

ple of the case of Grove and Dubois (a). And

Lord MANSFIELD, Ch. J. said, The rule had always been, that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back again in an action for money had

(a) stree, 112.

had and received. So where a man has paid a debt, which would otherwise have been barred by the statute of limitations; or a debt contracted during his infancy, which in justine he ought to discharge, though the law would not have against Diokason. compelled the payment, vet the money being paid, it will not oblige the payee to refund it. But where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again by this kind of action.

Bir

Judgment for the plaintiff.

BARKER and Another Executors, &c. of PYOTT against Friday, June 25th

EBT on bond in the penalty of 400% by the executors of A bond with the obligee against the obligor.

After craving over of the bond, and of the condition, (re-that a clerk citing that E. Pyatt had taken and employed Jonathan Hamp- faithfully ton as a servant, and in the nature of a clerk to him the said and acconn E. Pyott, and likewise as his book-keeper and accomptant, for all mo-A. Pyott, and incomes as the said E. Pyott should think fit the obligee to employ him about,) which declared that if the said J. Hamp- and his execton should and did from time to time make and give unto the wors, does said E. Pyatt, his executors and administrators, a just and not make the obligor liafrom, and likewise pay and deliver unto the said E. Pyott, ney received his executors or administrators, all such sum or sums of mo-by the clerk ney, bills, notes, goods, effects, and things whatsoever, and of in the serwhat nature soever, which he the said J. Hampton should executors of from time to time receive or discharge, or which should come such obligee, into his hands, charge, or custody, of or belonging to the who continue the busaid E. Pyott, his executors, or administrators, or to any other siness and person or persons, wherewith he or they should or might be retain him charged or chargeable, or otherwise in any other way or man- in the same ner howseexer; or if the said J. Hampton, his executors, or employment. administrators, did and should make and give, or cause to be given, unto the said E. Pyott, his executors, administrators, or assigns, full satisfaction and recompence, in lawful money of Great Britain, of and for all such monies, bills, notes, goods, effects, and things whatsoever, of or belonging to the taid E. Prott, his executors, or administrators, or any other person or persons, wherewith he or they might be charged or chargeable

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1786. BARKER against PARKER. chargeable as aforesaid, which upon making up any account or accounts, or otherwise, at any time or times should appear to have been received or discharged by, or come to the hands. charge, or custody of the said J. Hampton, and which be should not duly account for, pay, deliver or discharge himself from, to the said E. Pyott, his executors, administrators, or assigns, as aforesaid; or which should be found, confessed, or proved to be embezzled, mispent, or otherwise made away with, or unjustly detained by the said J. Hampton, or by any other person or persons, by or through his means, privity, or procurement, (saving all accidental losses by casual fire or robbery, in the conveyance of the said monies, bills, notes, goods, effects, or other things, as aforesaid,) the bond should be void. The defendant pleaded performance of the bond

particularly.

Replication-That the said E. Puott, in his life-time, to wit, on the 8th of May 1780, duly made his last will and testament in writing, and thereby devised and bequeathed to the said plaintiffs, their heirs, executors, administrators and assigns, divers real estates of him the said E. Pyott, and also the residue of his personal estate, after and subject to the payment of certain legacies and charges in the said will mentioned, upon trust, (amongst other things) that they should carry on the coal and culm trade, and the dealings in salt, and all other the trades and businesses in which the said testator was then concerned, or such parts or branches thereof, orsuch other trades or businesses, as might appear to them beneficial and advantageous to the family of the said E. Pyott. and upon such other trusts as in the said will are mentioned and expressed. That the said E. Pyott afterwards, to wit, on the 1st day of November 1782, died. That the said plain. tiffs afterwards, to wit, on &c. duly proved the said will, and took upon themselves the burther of the execution of the same; and that they, in pursuance of the said will, continu. ally, from the death of the said E. Fyott, had carried on the strades, dealings and businesses, in the said will mentioned. That the said 7. Hampton, at the time of the making of the said writing obligatory, and continually from thence until, and at the time of the death of the said E. Pyott, was employed. by the said E. Pyott as a servant, and in the nature of a clerk. to him the said E. Pyott, and as his book-keeper and accompan ant, and in such other business as the said E. Pyott thought fit. to employ him about: and that the said J. Hampton, upon. the death of the said E. Pyott, and from that time until, and upon, and after, the 31st of July 1784, continued in the ser-

BARKER against PARKEN

vice of the said plaintiffs, as executors, and during all that time was employed by them as a servant and in the nature of a clerk, and as their book-keeper and accomptant in the said trades, dealings, and businesses, so carried on by them, in pursuance of the said will, and in such other business as the plaintiffs thought fit to employ him about, concerning the said trades, dealings and businesses; and was not from the time of the making of the said writing obligatory, until after the said 31st July, and after the breach of the said condition of the said writing obligatory thereinafter mentioned, ever dismissed or discharged from his said service and employment. That after the death of the said E. Pyott, and whilst the said 7. Hampton so continued in the said service and employment of the said plaintiffs as aforesaid, to wit, on &c. the sum of 5021. 8s. 8d. of and belonging to the said plaintiffs, as executors, being the balance of an account then and there stated and settled between the said plaintiffs as executors, and the said J. Hampton, of and concerning divers sums of money of and belonging to the said plaintiffs, as executors as aforesaid, before that time received by the said J. Hampton, as such servant to them as aforesaid, for their use, had come into and was then in the charge of the said J. Hampton as such servant of the said plaintiffs as aforesaid; which said sum of money, the said 7. Hampton afterwards, on &c. at &c. was requested by the said plaintiffs to pay to them; yet, that the said 7. Hampton did not, when he was so requested, pay or deliver to the said plaintiffs, as executors, the said sum, &c. or make any satisfaction, &c. but neglected and refused, &c.

Rejoinder—That, after the death of the said E. Pyott, and after the said plaintiffs had proved the said will, and taken upon themselves the burthen of the execution of the same, to wit, on the 20th of April 1784, the said J. Hampton and the said plaintiffs accounted together, and came to a just and true account in writing of all and every sum and sums of money, which the said J. Hampton had theretofore received or discharged, or which had come into his hands, charge, or custody, of or belonging to the said E. Pyott, or his said executors, or to any other person or persons, wherewith he or they could or might be charged or chargeable, or otherwise, in any other way or manner: and upon such account the said J. Hampton was then and there found to be in arrear to the said plaintiffs, as executors as aforesaid, in the sum of 3221. and one half-penny, and no more; which said sum of 3221. and

one

Barker acqina PAPER.

and half-penny, the said J. Hampton then and there paid and discharged to the said plaintiffs. That after the death of the said A, Pyott, and after the said plaintiffs had proved the said will, and taken upon themselves the burthen of the exception of the same, to wit, on the 3d of December 1782 a new agreement was made between the said plaintiffs and the said ]. Hampton, that the said J. Hampton should serve the said plaintiffs as their ser ent, in the nature of a clerk, and as their book-keeper and accomptant in the said trades and business by them intended to be carried on in pursuance of the said will, and the trusts reposed in them: And that he should likewise buy and sell the different commodities to be bought and sold in the said trades and business, and pay the servants in the said trades and business, their respective wages, and which before that time the said 7. Hampton had not been accustomed to do, and that they should pay to the said J. Hampton a greater salary by the year, than the said E. Pyott in his life-time had paid to the said 7. Hampton, to wit, 201. a year more than the said E. Pyott had in his life-time paid to the said J. Hampten. That, in pursuance of such new agreement, the said Y. Hanston was employed as aforesaid by the said plaintiffs, in the said trade and business by them carried on, in pursuance of the said will and the trusts reposed in them, until, at, and after the said J. Hampton's receipt of the sum of 5021, 8s. ad., and not otherwise: And that the said sum of 502l. 8s. 8d. in the replication mentioned, was money which accrued to the said plaintiff's after the death of the said E. Pyott, in their said trades and business by them carried on in pursuance of the said will, and of the trusts reposed in them, and received by the said J. Hampton, after the settlement of the said account with the said plaintiffs as executors, by virtue and in pursuance of the said employment of the said J. Hampton, under the said new agreement with the said plaintiffs.

To this rejoinder there was a general demurrer, and join

der in demurrer.

Chambre, in support of the demurcer, contended, that the rejoinder neither denied, nor confessed and avoided, the re plication; neither did it contain any matter which barned the

plaintiff's action.

It appears by the condition of the bond, that the clork we not retained for any particular service, but to be employed at nerally in any kind of business which the testator chose; that the sureties were not only responsible for all money which

the clerk might receive during the life-time of the testator, but also after his death. The replication charges that the clerk was not discharged till after a breach of the condition: and the breach stated is in not accounting for trust-money to the extenors, which clearly falls within the letter of the condition of the bond, which was given for the purpose of securing all money, &c. of or belonging to the testator, or his executors. And there is nothing alleged in these pleadings to restrain this in point of construction. In all the cases of a similar nature, which have been litigated, the inclination of the Court has been to extend rather than to narrow the construction. In Barclay v. Lacras (a), the service was in some degree changed, for there a partner

BARKEL bgaint PAUKEL

#### (a) J. BARCLAY and Others against LUCAS, Michaelmar, 24 Geo. 3. A. R.

This was an action of debt on bond. The defendant, after craving over of the condition of the bond, (reciting that the plaintiffs, at the recommendation of the obligors, had agreed to tuke one Philip Jones into their service and employ as a first it their shop and counting-bouse, and the obligors had agreed to become security for his fidelity, as far as 500% each,) which declared that if the said P. Jones should faithfully account for and pay to the plaintiffs, and did not embezzle, &c. then the condition to be void; Pleaded, 1st, Non est factum. 2dly, That from the date of the bond, 23d February 1779, till the 24th of June 1780, the plaintiffs carried on the business of bankers, as co-partners, in their own names only. That the service intehded to be performed by the condition was to the plaintiffs, in the trade of bankers, so carried on by the plaintiffs only, and not in partnership with any other person. That on the 24th of June the plaintiffs received into barnership Robert Barclay. That On the 24th of June the plaintiffs received into barnership Robert Barclay. That P. Junes then quitted the service of the plaintiffs and Robert Barclay. That P. Junes during all the time he remained in the service of the plaintiffs alone, well and faithfully accounted, &c. 3dly, That P. This entered into the service of the plaintiffs on the 23d February 1779, continued in the same till the 24th of June 1780, and then quitted the service of the plaintiffs, and during that service accounted, &c.

Plaintiffs replied to the 2d plea (protesting against the intention of serving the plaintiffs only) that the service was meant and intended to be performed to them in the bisiness so then carried on by them during all the time they should continue in the same business, and the said P. Jones should continue to serve therein. That on the 24th June 1780, they admitted the said R. Barclay into partnership in their said trade, and in the same house wherein they exercised it at the time of making the said writing obligatory, who by such admission became possessed and entirled to 1-4 share of the said trade, and hath so continued. That on the 23d February the said P. Jones entered, &c. and continued in the service of the plaintiffs till the 16th February 1781, and was not during all that time dis-

charged.

The replication then assigned the breach, that after the said partnership, and while P. Jones so continued in their said service, to wir, on 16th of February 1761, he received in his said office and employment of one Mark Groces, the sum of 20th 16s, three-fourths of which, to wit, 15th 12s. was received by him on account of the plaintiffs; which sum the said P. Jones was afterwards requested to pay, &c.

The plaintiffs replied to the third plea, that P. Jones did not quit the service of the plaintiffs from 23d February 1779, till 16th February 1781; and then as-

signed a similar breach.

Rejoinder

BARKER against PARKER.

a partner had been taken in after the bond was given; and notwithstanding the service was to be performed to different masters

Rejoinder to the 1st replication, (protesting that the service was not intended to be performed as in the replication mentioned—protesting also that the plaintiffs did not take the said R. Barclay into partnership in their said trade, and in the same house, &c.) that after the said partnership all the monies received by the said P. Jones in his said office, &c. were received by him on the joint account of the plaintiffs and R. Barclay, as co-partners—traversing the receipt of 3.4 of the money in the replication mentioned by P. Jones, on account of the plaintiffs. Rejoinder to the 2d replication, that the said P. Jones quitted the service of the

plantiffs in manner and form, &c on which issue was joined

The plaintiffs our-rejoined to the 1st rejoinder, that the said P. Jones did receive the said 3-4 of the said sum of money on account of the said plaintiffs; on which issue was joined.

This cause was tried at the sittings after last Trinity Term, at Guildball, before Lord Mansfeld, when a verdict was found for the plaintiffs,—damages 1s.

-costs 40s subject to the opinion of the court on the following case:

That the bond stated in the declaration is the deed of the defendant. That on the 24th of June 1780, Robert Barclay was taken into partnership with the plaintiffs. That on the 16th of February 1781, Philip Jones, the clerk mentioned in the condition of the bond, received of Mark Groves 201. 16s. on account of the new partnership, and has not paid it over to the plaintiffs.

The question for the opinion of the court is, whether the defendant is liable to

the plaintiffs in this action?

Chambre for the plaintiffs. The real question is, whether the defendant is discharged from the obligation of this bond, as to the embezzlement of the plaint: fis' share of the money which belongs to them jointly with R. Barcley, by their having taken in a new partner. But that circumstance cannot vary the onligation, because this hond was given to secure the fidelity of the clerk to the plaintiffs' bunking house, rather than to the plaintiffs in their individual capacity. This question would never have arisen, had it not been for the case of Wright v. Russel, 3 Wils. 532. 2 Blac. Rep. 934. But that case differs from this in two very material circumstances: there nothing turned on the intention of the parties, which is denied in this case by protestation; and the breach in that case was assigned in defrauding the partnership generally; here, it is only for that proportion of the sum which really belonged to the plaintiffs. In cases like the present, the intention of the parties is to be attended to; and this bond was indisputably given as an indemnity to the plaintiffs in their business. The case of Arlington v. Merrick, 2 Saund. 412. cited in Wright v. Russel, does not apply; for the security in that case was expressly given only for six months, and the court would not extend it. The case in All. 10. is liable to the same objection. If a contrary construction were to prevail, and bankinghouses were obliged to take fresh securities from every clerk, upon every change of partners, it would be productive of infinite inconvenience. An embezzlement of the plaintiffs' share of the 201. 16s. by the clerk, is sufficiently stated to the court; for, it is found, that he received the whole sum, and has not paid it over.

Baldwin, for the defendant, contended that there was no material difference between this case and that of Wright v. Russel; and there the court would not extend the words of the condition. The service in the contemplation of the parties was to be performed to the plaintiffs only, and was not meant to be extended to others. The inconvenience would be great, if upon an extension of trade, the securities should be still liable; while the inconvenience to the other party would be trifling, because they would only be obliged to send to their sureties upon the change of partners. Besides, in the present case, it does not appear

masters than those originally named in the bond; by the circumstance of one of the partners quitting the business, and another

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to be an embezzlement of the separate effects of the plaintiffs; and, this being a joint injury to the plaintiffs and the other partner, the action cannot be severed.

Chambre in reply. The cases which have already been determined on the subject, prove that the strict letter of the condition has not always been attended to and the court has ever had recourse to the recital from which the intention of the parties is to be collected. The injury of which the plaintiffs complain is not a joint injury with the former partner; but the complaint which the plaintiffs have made on this record is only respecting the embezzlement of the plaintiffs' property; and this the jury have found. Lord Managiand, Ch. J.

The question in this case turns upon the intention of the parties at the time of entering into the contract. In questions upon intention we must look to the subject matter of the contract. It is notorious that there are many banking-houses in the city which continue for generations. This can only be done by a constant succession of partners: and even if i- ey should not bear the same name with the first proprietors, yet still the bouse frequently continues under the original firm. To carry on this business it is necessary to have a great number of clerks, whose office is extremely beneficial; for besides the present fees and emoluments, they are frequently taken into partnership in process of time. But it is of the utmost consequence to these houses that the clerks should behave honestly; and therefore a security is taken for their fidelity. The circumstance of taking in a new partner makes no difference, either as to the quantity of the business, or the exsent of the engagement. He continues to carry on the business of the plaintiffs; and this contract is co-extensive with his continuance in the house. security to the bouse of the plaintiffs, and no change of partners will discharge the chligor. Thinking as I do upon the subject, I am very glad to find that there is a material distinction between this case, and that in the Common Pleas. desendant has objected, that the present action is improperly brought : but I think, that the plaintiffs are entitled to the whole sum embezzled, and if so, they are clearly entitled to less. I am therefore of opinion, from the manifest intention of the parties, and from the clerk's continuing in the business notwithstanding one of the partners has been changed, that the plaintiffs are entitled to recover.

WILLES, J. The intention of the parties ought to govern the court in making their decision; in order to discover which, we must look at the recital of the condition of the bond. Now this recital is very material, for it states that the service is to be performed in the shop and counting-house and not to the plaintiffs. The partners in a banking-house are perpetually changing; and where a number of clerks are employed, the inconvenience of demanding fresh securities from each, upon every such change would be enormous. The introduction of a new partner does not increase the risk to the sureties; for a bond of this kind is an

undertaking for the clerk's honesty.

I cannot say that I accede to the doctrine laid down by the Court of Common Pleas, in the case of Wright v. Russell, to the extent to which it is there carried; but at present it is sufficient to say that this case differs from that.

In the case in 2 Saund, the recital of the condition shewed that the engagement was limited to six months; and the court would not extend it. And the case in All. 10, was governed by the same principle.

(a) Buller, J. The defendant has rested his case upon two grounds.

1st, On the authority of the case of Wright v. Russell.

2dly, On the form of these pleadings.

As to the first. This case is distinguishable from that in the Common Pleas; there, the breach assigned, was for embezzling the whole partnership money;

<sup>(</sup>a) Arbburst, Justice, was in the court of Chancery, as one of the lords came missioners of the Great Seni.

BARKER against PARKER. another being taken in his room: yet it was determined that the sureties were answerable for the honesty of the clerk, as well after a change of partners as before. And in the present case, the bond was given to secure the fidelity of the clerk to the executors as well as to the testator. It would be superadding other words to the condition, to confine it to the money which belonged to the testator, and which might be intercepted by the clerk before it came into the hands of the executor.

The rejoinder states a new agreement, by which the clerk was retained to serve the executors; that is a matter which the plaintiffs could not traverse. But this new agreement does not discharge the defendant from his former obligations. And although by such new contract the clerk was to be employed in paying the other servants, and buying and selling the different commodities in the several trades, which he was not employed to do in the testator's life time; yet that does not vary the original contract; because by the terms of such contract he was hired to serve generally, and not to do any particular act only. Neither did the increase of wages vary the service: it rather lessened than increased the responsibility of the surety.

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and I observe, from the report of that case, that Mr. J. Gould lays much stress upon the point, that the breach assigned was for embezzling the partnership money, whereas it should have been for the plaintiffs' money only. I confess I do not see the force of that objection; but however it is not applicable to this case; for here the plaintiffs have confined the breach to that proportion of the money which was actually their property. Mr. Baldwin has said that the jury have not found that three-fourths of this money belonged to the plaintiffs, not that it had been embezzled by the clerk, and that therefore the issues were found for the defendant; and that if only one of them were found for him, the defendant was entitled to judgment. But let us see how that stands. In the first replication (so the second plea,) it is stated that 20%. was received after the new partnership, three-fourths of which, namely, 15% were the property of the plaistiffs; this the jury have found for him. In the 2d replication, (to the third plea) it is alleged that the clerk received 15% on account of the plaintiffs, which he embezzled; this also is found for the plaintiffs. This brings it to the construction of the contract, which must depend on the intention of the parties. What has been said by my Lord seems decisive, that his bond appears on the face of it to be a security to the bouse, and not to the persons of the plaintiffs; and that as long as the clerk continues in that house, the defendant is liable. Ld. C. J. De Grey seems to rely much on the taking in a new partner being the plaintiffs own act, and says that it determined the obligation. But I wish he had gone farther, and said what would have been the case, supposing there had been mutual bonds, the one that the plaintiff should continue to employ the clerk, the other, that the clerk should act honestly, if the plaintiffs had taken in a new partner, whether they would not still have been obliged to employ the clerk? If that would not have discharged the obligation to employ, it is decisive; for both the obligations must be equally bind-Here the charge is not increased; the security is not given for the ability, but for the fidelity of the clerk. If the construction contended for were fo prevail, it might equally be said, that if the plaintiffs trade had been but 300%, per annum at the time of giving the bond, they should not increase it without an application to the sureries.

Per Cur. Let the poster be delivered to the plaintiffs.

· Wood, contra, was stopped by the Court.

Lord MANSFIELD, Ch. J. This is a very plain case. The service in the contemplation of the parties was the service to the testator. There was no idea then of carrying it farther.

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A trade is not transmissible: it is put an end to by the death of the trader. Executors co nomine do not usually carry on a trade; if they do so, they run great risk; and without the protection of the court of Chancery they would act very unwisely in carrying it on.

The bond in question is relative to the service with Pyott, the testator. It was given as an indemnity that the clerk should be faithful to him; and should pay all the money received on his account to him, or to his executors; because money might be in his hands at the time of the testator's death, for which he could only account to the executors. So that it was the intention of the parties that the bond should

not be extended beyond the life of the testator.

If executors carry on a trade, they must do it as individuals for their own advantage. I remember many instances of trade being carried on under the direction of the court of Chancery. But this is quite a new thing, and it shews the materiality of the rejoinder. There is not only a new agreement, but a greater burthen is thrown thereby on the clerk, on which account he is to receive greater wages. the accounts relative to the transaction in the life-time of the testator were settled. This is a new agreement made by the executors personally, and cannot affect the assets of the

There is a material difference between the present case, and that of Barclay v. Lucas, which was cited; for there, the same trade was carried on by the original masters in the same manner; and the only difference was the introduction of a

new partner.

BULLER, J. The words of the condition of this bond must be explained by the recital, which was entirely omitted in the argument. But the recital of this condition is, that Hampton was retained as a servant, and in the nature of a clerk to him the said testator, and likewise as his book-keeper and accomptant, and in such other business as the said testator should think fit to employ him about; but there is no men, tion made of the executors.

This is just like the case of Arlington v. Merricke, 2 Sound. 411. There the condition of the bond (after reciting that the

BARKER against PARKER. plaintiff had appointed one Thomas Jenkins to be deputy postmaster for six months) was , that Fenkins should well and truly observe, perform, and execute, all such orders and instructions as the said plaintiff, his executors, &c. should fram time to time give or send. But notwithstanding the employment continued for a longer period, the Court held that the bond was only to continue in force for the six months. So in this case the service is confined to the testator. And though the clerk was to account to the executors, it was only for money belonging to the testator.

Indement for the defendant.

Fune 26th.

WALTON and Others, Assignees of SUTTON, against SHELLEY.

security which he has given, though he is ed in the event of the suit (a).

A person is TTPON a motion to set aside the verdict and grant a new trial, Buller, J. before whom the cause was tried at tent witness Guildhall, at the sittings after the last term, reported as follows;—That this was an action upon a bond given by the defendant to Sutton, to which there was a plea of non est factum, and another of the statute of Usury. It was proved by one not interest. witness, for the defendant, that the bond was given in consideration of delivering up two promissory notes made by Mrs. Perry, payable to Birch or order, the one indorsed by Birch and Davenport Sedley, the other by Birch, Corbin, and Davenport Sedley, to Sutton. Davenport Sedley was then called by the defendant, to prove that the consideration for the notes was usurious. But his evidence was objected to on two grounds; 1st, That he was called to invalidate a security which he had given; and that an indorser of a note, independently of any question of interest, could not be permitted to prove a note void, which he himself had indorsed; 2dly, That he was interested in the question, which was meant to be put to him; for if the notes were given for an usurious consideration, he would never be liable to pay them: though by overturning the bond, they might be set up again. For these reasons the witness was rejected, as being incompetent.

This motion was made upon the ground that Davenport Sedley was a competent witness, and ought to have been ad-

mitted to prove the fact of the usury.

Mingay, Baldwin, and Manley, shewed cause, and argued upon the two questions which had been made; 1st, Whether

(e) Vide post 3 vol. 34, 36; and Trelawney v. Thomas, 1 H. Bl. Rep. C. B. 308.

the witness was not interested in the question; 2dly, Whe- 1786. ther in any case a person shall be permitted to invalidate his own security? Upon the first ground they contended that WALTON the witness was certainly interested in the question which was put to him; for before the bond could be impeached, it was necessary to prove that the notes were usurious; but the witness being an indorser of those notes could not be admitted to give such evidence. The answer given to this objection at the trial was, that Sedley's name had been struck off: but if this had been an action on the notes themselves against the drawer, and Sedley had been released, his testimony could not have been received, because he is immediately concerned in answering any question upon the validity of them. It is upon this principle that many persons are incapacitated from giving evidence, who are entirely uninterested in the event of the cause; because they are interested in the question which is put to them. As in the case of commoners, who are not allowed to give evidence in an action concerning the right of common in another. So also in the case of underwriters; they are never permitted to be called as witnesses in an action upon the same policy which they have subscribed, though they are not interested in that suit, as the verdict cannot be given in evidence in any other action. Neither can a co-obligor give evidence in an action upon the bond which he himself has executed, for the same reason.

2dly. The witness is called to invalidate his own security: since the consideration of the bond was the giving up of the notes, of which he was an indorser; and therefore to destroy the one, he must impeach the others. The courts have frequently laid it down as an invariable maxim, that no man shall be suffered to invalidate his own instrument; if it were otherwise, the consequences would be very prejudicial to trade. In the case of Abrahams and Bunn (a), where the borrower of money was called to prove an usurious contract entered into by the defendant, who was a pawnbroker, though the competency of the witness was allowed because the pledge was returned, yet Lord Mansfield said, " Had the defendant " produced a security, or proved the pledge to be remaining "in his custody, it would have been a different consideration, "whether the witness, who was the borrower of the money, " could be examined to contradict this."

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(a) 4 Byr. 2251.

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discharged.

In an action by the drawee of a bill of exchange against the drawer, the acceptor, who was insolvent, was not permitted to give evidence. *Michel v. Conaway* (a).

In the case of Winlow and Daniel (b), which was an action of traver for three bills of exchange, Lord Mansfield merely said, that an indorser might be a witness to prove the property of the notes in A. or B. as he was equally responsible to either. In such cases the testimony of the indorser does not go to invalidate his own security, and therefore he is admissible. But where such testimony goes in discharge of the note, he is not a competent witness. As in the case of Whittenbury and others against Jackson et uxor executrix (c), which was an action on a promissory note given by Wheeler the testator in his life-time to one John Collier, and by him indorsed to the plaintiffs: it appeared to have been an accommodation-note given by the testator to Collier, who had bought goods of the plaintiffs, for which he was made debtor in their books to nearly the amount of the note. The defendant proposed calling Collier to prove that the note had been satisfied by his having given two bills to the plaintiffs in discharge of it. The plaintiffs on the other hand contended that the bills had been refused by them in discharge of the note, but that they had received them in payment of the book debt; and they objected to Collier's testimony being received us indorser of the note. Bullery J. refused to admit him upon two grounds, 1st, That he was interested in proving the note paid, for he thereby got rid of it: and as to his being liable for the book debt, that was a different transaction. That he was called to invalidate his own security; for though his evidence did not tend to impeach the validity of the note, vet it tended to take away the remedy upon it by shewing it

It was not till after Lord Ch. J. Lee's time that the party who was interested in a note, could give evidence concerning it in a criminal prosecution for forgery, perjury, or usury, where the note was the foundation of it. 2 Stra. 1043, 1104, 1229.

Bearcroft and Bower, contra. The tendency of this court, of late years, has rather been to confine than to increase objections to the compétency of witnesses. In order to judge of the admissibility of a witness, several circumstances are necessary to be understood. 1st, What the issue is between the parties. 2dly, What circumstances have already been proved

<sup>(</sup>a) 12 Vin. Abr. tit, Evid. p. 14. pl. 47. (b) Sittings after Hil. 1786 at Westminster. (c) Sittings after East. 1786 at Guildball.

ia the cause. 3dly, What the witness is called to prove; and then it is to be considered, whether there is any substantial ground for the rejection of his testimony. The issue between WALTON the parties in this case was, whether the bond had been given "SHELLEY: by the defendant for an usurious consideration. It had been already proved by another witness in the cause, that the consideration for executing this hond was the giving up of the two notes, which were at the trial avowedly in the hands of the defendant; having been restored to him at the time that the bond was taken. Sedley, the witness, was called to prove the consideration of these notes usurious, in order to invalidate the bond. He was objected to as being an indorser, and thereby coming to set aside his own security. But when the peculiar circumstances of this case appear, the Court will see that he could have no possible interest in setting aside the bond; for if he were interested at all in giving his evidence, it was rather against proving the fact for which he was called; for so long as the bond subsisted, he was entirely discharged; therefore it was his interest to support it.

Then, if there be no objection to his evidence in point of interest, the only consideration is, whether he shall be permitted to invalidate his own security. They admitted the propriety of the general rule, that no person ought ever to be permitted to invalidate any instrument or cash paper to which he has contributed to give a currency, by affixing his But that rule has only been adopted in cases where the action has been brought on such specific note or bill against the person liable. There the evidence of the indorser could not be received, because it tends to impeach his own security. But that principle does not apply here; for the notes of hand have actually been given up: they are not the subject of dispute in this action; and therefore it is no longer the interest of the public to prevent the indorser from telling the truth, as he himself is no longer liable upon them, and they have ceased to be in circulation. If indeed the notes had remained as a collateral security, and had not been merged in the bond, the case would have been different. As the witness therefore was not interested in the cause, neither was he in the question; for the question was upon the validity of the bond, (to which he was not a party,) and not on the If the question had been, whether these notes were the consideration of the bond, then the witness might have WALTON against Shelley.

been interested: but that had been proved by another witness. In the case of Clarke against Shee and another (a), Lord Mansfield mentioned the case of Bush and Rawlins, which was an action of debt upon the 2 Geo. 2. c. 24. against bribery; where a person who had taken the bribery oath was held a competent witness to prove that he himself had been bribed. So in some cases a man is permitted to impeach his own security, as by pleading usury upon the record.

Lord MANSFIELD, Ch. J.

The old cases, upon the competency of witnesses, have gone upon very subtle ground. But of late years the courts have endeavoured, as far as possible, consistent with those authorities, to let the objection go to the credit, rather than to the competency, of a witness. In this case, it seems to me that the witness had no interest in the present question, for either way he is discharged. If the bond be good, it puts an end to the notes; if bad, the same ground, that vacates the bond, vacates the notes; therefore, in point of interest, I think there is no objection to his competency. But what strikes me is the rule of law founded on public policy, which I take to be this; that no party who has signed a paper or deed shall ever be permitted to give testimony to invalidate that instrument which he hath so signed. And there is a sound reason for it; because every man who is a party to an instrument gives a credit to it. It is of consequence to mankind that no person should hang out false colours to deceive them, by first affixing his signature to a paper, and then afterwards giving testimony to invalidate it. It is emphatically right in the case of notes; for in consequence of different statutes, two very hard cases have arisen. First, with respect to a gaming note, which, though in the possession of a bona fide purchaser, without notice, is void. It is similar in the case of usury; a note given for an usurious consideration, though in the hands of a fair indorsee, is equally void. And therefore, whenever a man signs these instruments, he is always understood to say, that, to his knowledge, there is no legal objection whatever to them. The civil law says, nemo alligans suam turpitudinem est audiendus. Now apply this general maxim to the present case, with the distiction which has been taken. It has been argued at the bar that this rule only holds where the action is brought upon the notes themselves, and therefore not relevant to this case. But I take the.

(a) Comp. 199.

the cases to be exactly the same. For the question on the validity of the bond involves in it the validity of the notes. The obligee of this bond trusted to the notes; he gave them up as a consideration for the bond; he trusted to the name of the indorser, and that he knew of no objection to the notes; and yet this same person was afterwards called to say that they were given for an usurious and illegal consideration; therefore, on that ground, I am of opinion that he was an incompetent witness.

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WILLES, J. As to the incompetency of Sedley's evidence on the ground of interest, I am clear that he had none; or rather, that he came to give evidence contrary to his interest; because by destroying the bond he set up the notes. But the general rule is, that no man shall be permitted to invalidate, by his own testimony, an instrument to which he is a party; and there has been no case cited in which this rule has been There has indeed been an instance, where a man impeached. was suffered to explain his own deed. That was a case before me at the last assizes at Lancaster. Two brothers joined in an assignment of a ship; and the question was, whether one of them had any interest in the vessel at the time of the assignment. He was called to prove that he had none. His evidence was objected to, on the ground that he ought not to be permitted to contradict his own deed; but I was of opinion he was a competent witness, because he came to swear against his own interest, that he had no property whatever in the vessel, and he explained it in this manner; that the person to whom the assignment was made thought, that this witness had an interest in the vessel, and would not accept the assignment unless he were joined in it: and the Court of Common Pleas refused an application last term, to set aside the verdict, and agreed with my direction.

It is better in general that objections of this kind should go to the credit, than to the competency, of the witness. But the present question falls within the general rule, that no man shall be permitted to allege his own turpitude in having given

credit to a false and illegal security.

ASHBURST, J. The general rule is, that where a man is not interested in the event, he shall be a competent witness, though he may have a bias upon his mind with regard to the subject matter. As if a person bring two several actions against two defendants for the same battery; in the action Vol. I.

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against one, the other may be a witness, because he is not interested in the event. Any objections to such testimony should go to the credit rather than to the competency of the witness: therefore, if the present objection had rested solely on the question of interest, I should have been of opinion that Sedley was a good witness. But he is inadmissible on another ground, that no man shall be permitted to invalidate his own act; and here he has been a party to the fraud by affixing his name to the notes, and giving them a sanction; and having done that, he shall not be admitted upon any account to say that those notes were void.

BULLER, J. Two grounds of objection have been taken. The first steers clear of interest in the event of the cause; and I have always understood it to be a settled principle, that no man shall be permitted to invalidate his own act. tinction has been attempted to be made between the present case, and an action on the notes themselves; but there is no For if an action be foundation for such a distinction. brought on a note against the drawer, an indorser cannot be called as a witness for him, though he is not interested in that cause; and if a verdict be given against the drawer, and satisfaction obtained from him, the indorser is discharged. that case it is his interest to charge the drawer; therefore there is no difference between an action upon the notes against the drawer, and the present action upon the bond. But the ground of objection has always been, that no man shall invalidate his own security.

As to the question of interest, it is much to be lamented that there is such confusion in the cases. I have always been of opinion, that the best rule to go by, was to consider whe. ther the witness was to derive any advantage from the event of the cause; but many cases tend strongly to contradict that The material thing to be considered is, whether there is any distinction between the interest which the witness may have in the issue of the cause, and the question to be put to I am strongly inclined to think, that the most solid ground is, to confine the objection to an interest in the event of the cause: but in doing that we must overturn many cases. As in the case of commoners; if the issue be on a right of common, which depends on a custom, pervading the whole manor, the evidence of a commoner is not admissible, because, as it depends upon a custom, the record in that action would be evidence in a subsequent action brought by that

very witness to try the same right: therefore there is a good reason for not receiving his testimony in such case. But the same reason does not hold where common is claimed by pre- WALTON scription in right of a particular estate; because it does not against follow, if A. has a prescriptive right of common belonging to his estate, that B. who has another estate in the same manor, must have the same right; neither would the judgment for A. be evidence for B. and yet there are cases, which lay it down as a general rule, that one commoner is in no case a witness for another.

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Then in the case of policies of insurance, it has been held, that one underwriter connot be a witness for another. Ridout and Johnson, East. 11 Ann. And the East India Company and Gosling, Mich. 16 Geo. 2. cor. Lee Ch. J. (a).

In these cases if the evidence offered tend to invalidate and destroy the instrument itself, that may be a reason for rejecting such testimony; but where such evidence is offered for any other purpose, there does not seem to be any good reason why it should not be received; for that verdict could not be given in evidence in another action upon the same policy against the witness or another underwriter. The cases on this subject, which have staggered me most, are two later ones in this Court, by the names of French v. Backhouse, and French v. Foulston, E. 11 G. 3. (b). Those were two distinct actions of covenant brought against two part-owners of a ship by the husband of her, who had been appointed to that office by a deed executed by all the joint-owners, by which deed they empowered him generally to advance or lend money, &c. The husband of the ship insured for all the owners, and brought separate actions against two of them. They were each of them charged for the amount of the whole sum paid. It was there agreed, that the direction to insure, given by one part-owner, did not bind the rest. first action against Backhouse, Mr. Dunning offered to call the other part-owner, and insisted that he was a competent witness, because he was not interested in the event of that suit; for that each of the two causes were to stand on it's own evidence: but he was rejected by Lord Mansfield, as an incompetent witness (c); and the Court, upon motion for a new trial, were afterwards of that opinion. There the second defendant was certainly not interested to support the defence in the first cause; for if the plaintiff had recovered in that, the

(a) Bull's Nis. Pri. 283. (b) 5 Burr. 2727. (c) Vid. Lock v. Hayton, Fort. 246

against

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the second defendant who was offered as the witness could not have been charged with any part of the damages recovered WALTON in the first action.

Therefore, if there be any difference between an interest in the question, and an interest in the event of the cause, and an interest in the question disables a witness, I think these cases prove that this witness was incompetent; for the question put to him was upon the validity of the notes. How or in what manner such evidence was to bear upon the case was material for further consideration and further evidence in the progress of it; and the witness could not tell how the cause would turn out, or what effect his testimony might produce.

Rule discharged.

Monday, June 26th.

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## KULEN KEMP and Others against VIGNE.

Money hav- F "HIS was an action on a policy of insurance, which came ing been exon to be tried at the sittings after last Easter Term. pended in re-claiming at Guildhall, before Buller, J. who non-suited the plaintiff. Upon a motion to set aside that non-suit, the following a cargo on board a ship facts were reported. That the insurance was upon goods on was insured board the ship Emanuel, at and from Falmouth to Marseilles. by the own-warranted a Danish ship; and on the policy was this memoers upon the randum; "The following insurance is declared to be on moevent of the " ney expended for reclaiming the ship and cargo valued at abip's arrival "the sum which shall be declared hereafter. The loss to be seilles; The " paid in case the ship does not arrive at Marseilles, and with-"out farther proof of interest than this policy; warranted ship being captured and restored " free from all average, and without the benefit of salvage." It appeared that the plaintiffs were proprietors of the cargo. upon appeal, relinbut not of the ship. That the ship originally sailed with the quished her cargo on board from Riga on a voyage to Marseilles, and voyage and that an insurance had been effected at Bremen upon the cargo was afterwards lost; for that voyage; in the course of which she was taken, and Pending the brought into Falmouth by an English privateer. That sentence appeal the of condemnation had been there obtained, which was aftergoods were terwards reversed upon the prize having been proved to be a ordered to he sold, and neutral ship; but the expences of procuring that reversal were the expences ordered by the Admiralty Court to be a charge upon the cargo. of the ap-The peal were afterwards

therewith; yet an averment of a loss by capture is bad, because the ship might, notwithstanding the capture, have afterwards arrived at Marseilles; and this being a wagering policy, the assured could not at any time abandon.

KULEN KEMP against VIGNE-

The plaintiff's agents accordingly paid the sum of 1031/. 14s. for the expences of reclaiming the ship and cargo; and immediately procured the policy in question to be effected in January 1781, according to the purport of the memorandum. In the February following the ship set sail from Falmouth with the original cargo on board, in the prosecution of her voyage to Marseilles; but on the 26th of the same month, before her arrival there, was captured by a Spanish ship, and carried into Ceuta in Spain, where she was again condemned. peal was brought in the superior Court of Madrid which promising to be of long continuance, the cargo, which was of a perishable nature, was ordered to be sold, and the proceeds to be brought into Court, to wait the event of the suit. In May 1783 the vessel was restored by sentence of the Court, and the surplus of the proceeds which arose from the sale of the cargo was paid to the owners, deducting the expences incurred in Spain in prosecuting the appeal. After all the charges paid, there only remained twenty-six rix dollars. As soon as the ship was liberated, she sailed from Centa to Malaga, in order to refit, and having there made the necessary repairs, set sail for Bremen, and in that voyage was lost,

The insurance made upon the cargo at Bremen has been paid. The declaration averred that "whilst the ship was proceed"ing in her said voyage from Falmouth to Marseilles, and be"fore she could arrive at Marseilles, she was captured by
"the Spaniards, and thereby the said ship, and also the goods
"and merchandizes on board her, were totally lost to the

" plaintiffs."

BULLER, J. then proceeded to observe, that at the trial it was objected on the part of the defendant, 1st, That this was not an insurable interest; and 2dly, That the plaintiffs could not recover upon the policy in this form of declaring; for they had stated the loss to have happened by capture; whereas though the vessel was captured, yet having been afterwards restored, she might have reached her destined port, notwithstanding the capture; in which case the underwriters would have been discharged by the terms of the memorandum. And that he, being of that opinion, had non-suited the plaintiffs.

Erskine and Adam shewed couse; and contended that the non-suit ought to stand as well upon the merits, as upon the validity of the objection, which had been taken in point of form. It is material in the first instance for the Court to con-

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KULEN KEMP against VIGNE. sider how far the averment made by the plaintiffs, that they are interested in the premises, is well founded in point of law; for if it appear that the underwriters at Bremen were answerable for the expences which had been incurred in reclaiming the goods, in that point of view the present contract would amount to a reassurance, and was consequently void. Then as to the event insured, which is the arrival of the ship at Marseilles; in order to entitle the plaintiffs to recover upon an averment of a loss by capture, they should have proved that the ship did not arrive there in consequence of the capture. But, notwithstanding that event, the ship might afterwards have reached her port of destination.

This policy is essentially defective and nugatory; for the subject matter of the insurance is entirely unconnected with the event which is insured against, the plaintiff not having insured against any event by which he might be deprived of his property. And whether the ship and cargo arrived or not at Marseilles was perfectly immaterial; for if the ship and cargo arrived, the plaintiffs could not have been reimbursed the expences which they had been put to; the cargo would still only have been worth its original value: and if it did not arrive there, the underwriters at Bremen would have been liable. So that it would have made no difference as to the real interest of the plaintiffs, whether this insurance had been made upon the arrival of any other ship; and it is in the nature of a wager.

To entitle the plaintiffs to recover, it was incumbent on them at the trial to have shewn two things; 1st, That the vessel used her utmost endeavours to get to Marseilles; and for this purpose it must be taken, that the plaintiffs had a right to order the destination of the vessel; 2dly, That she was prevented from arriving there by some peril insured against. The event insured against here, was the non-arrival of the ship at Marseilles, and there is an averment that the ship was captured. If this had been a policy upon interest, the averment that the ship was captured, would have been good; for, in such case, wherever the voyage is interrupted or defeated, the party interested may abandon: but it is otherwise upon a wagering policy, there being nothing to abandon, as the subject matter of the insurance in question is incapable of abondonment: and this distinction was taken in Fitzgeruld and Pole (a). Here then the plaintiffs have entered into two inconsistent contracts. As against the underwriters at Bremen. the

(a) 5 Brow. App. 137.

the plaintiffs were entitled to abandon upon the first of these contracts, and recover as for a total loss; for such a policy is an indemnity against a particular event by which a loss or damage may accrue to the thing insured. But with regard to the present contract, the event insured being the arrival of the ship at Marseilles, the plaintiffs could not abandon, but were bound to use their best endeavours to send the ship thither. For if by any act of the assured, as by abandonment, it was rendered unnecessary for the ship to proceed to Marseilles, and in consequence she steered a different course, the underwriter was instantly discharged; therefore the very act of abandonment, which enabled the plaintiffs to call upon the underwriters at Bremen, precludes them from maintaining their present demand.

Piggot and Baldwin, contra, argued from the clear intention of the parties, that the only object of the insured, in procuring the policy in question to be effected, was to indemnify themselves against the expences which they had been put to in reclaiming the cargo. They had acted bona fide, and laid all the information which they were in possession of before the underwriters. This demand is declared to be for money actually expended upon the goods, and therefore the increase is only to be considered as an increase of the original value of the cargo, and as if it had been under-insured at first; in which case it would certainly have been competent to them to have covered the whole of their interest by a fresh insurance.

Although by the terms of the memorandum on the policy the event insured was the arrival of the ship at Marseilles, and not of the cargo; yet that must necessarily be confined to her arrival in that voyage. It could never have been the meaning of the parties, that the assurers were to be discharged, if the ship arrived at Marseilles at any distance of time; every contract of this nature is obviously confined to the voyage intended. But if the object of the voyage were defeated by any peril in the course of it, the continuation of it became nugatory; and the assured having in consequence abandoned that voyage, and afterwards steered a different course, it cannot be considered as amounting to a deviation for the purpose of discharging the underwriters; for the moment that the voyage was defeated, that event happened upon which they were liable. The subsequent sentence for restoring the ship and cargo will not vary the question. When the vessel was taken and carried into Ceuta, it was impossi-

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against

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Kulen Kemp against Vignz. ble to foresee what expences would be incurred, and the cargo being of a perishable nature, it was thought most for the advantage of all parties to dispose of it; this being accordingly done, a total end was put to the voyage, and from that moment the defendant was fixed. What became of the ship afterwards was perfectly immaterial to these parties. The sale therefore of the cargo, being the unavoidable consequence of the capture, must have relation back to its original cause; and then the averment in the declaration is true and proper.

Lord Mansfield, Ch. J. The interest on which the plaintiffs effected this policy, was money laid out in reclaiming the cargo. The event insured by the policy, was the arrival of the ship at Marseilles. If she did not arrive, then the money was to be paid; if she did, there was an end of the insurance. A loss accrued upon the cargo in the voyage; the underwriter is sued, and the loss is averred in the declaration to be by capture. The fact of the case is, that the ship was taken by a Spanish privateer, but was afterwards restored, and in a condition to pursue her voyage, and was afterwards lost in another voyage.

The answers to this case are decisive.

First, this is a wagering policy, and it is just the same as if the event insured had been the arrival of any other ship at Marseilles. The loss or safe arrival of the ship did not alter the security. The parties were interested in the cargo alone, but the event insured was the arrival of the ship, and not of the cargo. A necessary consequence of this being a wagering policy is, that the insured cannot abandon: but, even supposing it to be a policy on interest, it is enough to say, that in this case the parties never did abandon. In effect, there was only a temporary capture, and though by construction a temporary capture is such a loss, as that an assured upon interest is warranted in abandoning at the time, if he please, yet we must consider what the truth of the case was between these parties: now this was a wagering policy, and in such case there can be no abandonment.

But what alone is a fatal objection to the plaintiff's claim is, that they did not attempt to pursue the voyage to Marseilles, which it was in their power to do after they left Ceuta. The circumstance of the ship's having been captured and detained for a time, did not prevent her from prosecuting her voyage after she was liberated; nor is it any excuse, that the plaintiffs

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could no longer control her destination; for in wagering policies the assured take upon them to perform all that the owners themselves of the vessel could have done in the same situation.

ALMP again**st** 

Therefore in every point of view the plaintiffs are precluded from recovering.

WILLES, J. I shall confine myself to the formal objection which has been taken, because I have some doubts whether the plaintiffs had not an insurable interest; for by the sentence of the Court of Admiralty the expences of reclaiming were thrown upon the owners of the cargo, by which the price of it was increased; therefore I forbear to give any opinion upon that ground. But on the other grounds, it is clear that the plaintiff cannot recover. In the first place, there was certainly a deviation, for the ship set sail for Malaga, instead of proceeding to Marseilles. Secondly, the plaintiff has declared for a loss by capture: but after the capture, the policy might still have been complied with by the ship's going to Marseilles; and therefore the loss cannot be said to have happened by that circumstance.

ASHHURST, J. I am of the same opinion with my Lord upon both points. In the first place, this is to be considered as a wagering policy; and in such case, the party insured takes upon himself to do every thing which the owners of the ship might have done; and they might have directed the ship to Marseilles. It is also certain that the party insuring a ship to any place must use all due diligence to further her voyage thither, which not having been done in this case, upon that

ground also the non-suit ought to stand.

BULLER, J. It would be a sufficient objection in this case, that the loss is averred to be by capture; but as the merits have been gone into, I shall give my reasons for supporting the non-suit upon these grounds also. Policies of insurance are of two sorts; either upon interest, or by way of wager. Where it is upon interest, it has been solemnly determined that it is merely a contract of indemnity, and therefore ought to be so framed that the party can only recover in case of a loss really sustained, and to the precise amount of that loss. My opinion at the trial was, that the parties had it in view to insure a real interest, and protect themselves by the policy. But whatever their intentions might have been, the court is bound to look to the instrument, and see what they have done; and if they have not expressed their intentions upon the poli-S s Vol. I.

1786. KULEN KEMP againet VIGNE. cy, the court cannot help them, and they must remain bound by their contract. The circumstances of this case are, that the plaintiffs were owners of the cargo, but were not interested in the ship. They laid out the money which is the subject of the insurance in reclaiming both after a capture and condemnation; and although they were in no degree interested in the ship, yet the event which they insured, is the safe arrival of the ship at Murseilles. These parties therefore, who were interested in the cargo alone, did not insure that, but something else with which they had no concern. The goods might all have arrived safe, and the ship have been lost; and yet they would have been entitled to recover on this policy as for a total loss. And on the other hand, if the ship had arrived, and the goods had been lost, they could not have recovered, even though they would have really sustained a damage. The policy is not adapted to the real truth of the This then is a wagering policy, and that circumstance aloneis decisive upon the ground of merits. The cases of wagering policies, and policies upon interest, have been confounded in the argument. In the latter case, if the voyage be lost, it is not necessary for the assured to proceed on with the hulk of the ship; for they are at liberty to abandon; but then there must be an abandonment in point of fact. Therefore, in this case, it is enough to say, that even if the parties could have abandoned, they have not done it. The plaintiffs have no ground for maintaining this action, either upon the merits or upon the formal objection.

Rule discharged.

Tuceday, June 27th. BELFOUR Administrator, &c. against WESTON.

A lessee who coven-

by the lessor after no- .

tice (a).

HIS was an action of covenant. The declaration stated, That by an indenture made ants to pay on the 1st of July, in the 17th year of the reign, &c. the inrent, and to testate demised to the defendant a messuage or tenement, repair, with the ware-houses, &c. in Wapping street, for 21 years, at express ex. with the ware-houses, &c. in Wapping street, for 21 years, at ception of the yearly rent of 221. payable quarterly; in which indenture casualties by was a covenant on the part of the defendant for the payment of fire, is liable upon the co-rent. That the defendant entered, &c. It then stated a venant for breach of the covenant for non-payment of half a year's rent, rent, though due at Lady day 1784.

the premises Plea-I hat by the said indenture of lease in the said deare burned down, and claration mentioned, it is farther covenanted that he the said not rebuilt defendant

(a) Vid. Doe d. Ellis v. Sandbam, poet. 705.

BELFOUR against Waston.

defendant should and would, at his own proper costs and charges, from time to time, and at all times, during the continuance of that demise, well and sufficiently repair, uphold, support. &c. and keep the said messuage or tenement and premises, thereby demised, and every part and parcel thereof, with their and every of their appurtenances, and all the glass windows, pavements, &c. thereunto belonging, in, by, and with, all and all manner of needful and necessary reparations and amendments whatsoever, when, where, and as often as, need or occasion shall be or require, (casualties by fire only and always excepted;) and the said messuage or tenement, and all and singular other the premises, being so well and sufficiently repaired, upheld, &c. and kept as aforesaid, should and would, at the end or other sooner determination of that present demise, which should first happen, peaceably and quietly leave, surrender and yield up unto the said intestate, his heirs or assigns, (casualties by fire only excepted as aforesaid.) And moreover that it should and might be lawful to and for the said intestate, his heirs, and assigns, and every of them. and their and each of their attorneys or agents, stewards or officers, with workmen or others, in their respective company or companies, or without, twice or oftener in every year, yearly, during the term thereby granted, at reasonable times in the day time, to enter and come into, and upon the said messuage or tenement and premises thereby demised, every or any part thereof, there to view, search, and see the state and condition of the same, and of the repairs thereof, and of all defects, decays, and wants of reparation then and there found to give or leave notice, or warning, in writing, at or upon the said premises or some part thereof, unto or for the said defendant, his executors, administrators, or assigns, to repair and amend the same within the space of three calendar months then next following; within which said time or space of three months, the said defendant, for himself, his executors, administrators, and assigns, and every of them, did thereby covenant, promise, and agree to and with the said intestate, his heirs, and assigns, to repair and amend the same accordingly, (casualties by fire only excepted as aforesaid.)
And the said defendant further saith, that the said plaintiff ought not to have or maintain his aforesaid action against him, because he saith that before Michaelmas day 1783, to wit, on the 28th of September 1783, the said demised premises. with the appurtenances, against the will and without the default of the said defendant, were burned, and consumed by fire. againet

fire, whereof the said intestate afterwards in his life-time, to wit, on the same day and year last aforesaid, at &c. had no-BELFOUR tice; and the said intestate was then and there requested by the said defendant to rebuild the premises aforesaid with the appurtenances. And the said defendant further saith, that the said demised premises, with the appurtenances were not, nor was any part thereof, rebuilt by the suid intestate, for half a year next following the said Michaelmas day in the said year 1783, nor are the same yet rebuilt. And the said defendant during all the time aforesaid neither had or enjoyed, nor could have or enjoy, any, use, benefit, or occupation of the said demised premises, with the appurtenances. And this the said defendant is ready to verify, wherefore, &c.

To this plea there was a general demurrer, and joinder in

demurrer.

The Court did not hear any argument on this case; they being of opinion that the point had already been determined by the authorities in All. 27. 2 Stra. 763, and 2 L. Raum. 1477: and.

BULLER, J. read the following note of the case of Pindar against Ainsley and Rutter, at the Sittings at Westminster, after Michaelmas term 1767. That was an ejectment by the tenant against his landlord to recover the possession of some houses which had been burned down during the term, and had been rebuilt by the landlord. In the lease there was an express covenant on the part of the tenant to pay rent; but he had paid none subsequent to the time of the fire. Lord Mansfield, before whom this was tried, said, the consequence of the house being burned down is, that the landlord is not obliged to rebuild, but the tenant is obliged to pay the rent during the whole term. The premises consist of houses only, and the fire has made them quite useless. In March 1763 the premises were worth nothing; but the landlord, if he had insisted on the rigour of the law, might have obliged the plaintiff to pay the rent for nothing during the remainder of the term; and then the plaintiff would have been glad to have delivered up the premises. The houses being insured, is nothing to the tenant. Therefore he left it to the jury to consider, whether it was not to be presumed that the tenant had abandoned the lease at the time of the fire; and accordingly. the defendant had a verdict.

Judgment for the plaintiff (a).

PRAY

(a) Vide 3 Burr. 1637.

## PRAY and Others against EDIE.

1786. Wednesday, June 28th.

IN a case on a policy of assurance on a ship and its car- If an agent I go from Sunbury in Georgia to Amsterdam, it was agreed broad effect that a verdict should be taken for the plaintiffs, and that the a policy defendant's counsel should have the liberty of moving the without in-Court to set it aside, and enter a verdict for the defendant serting his (without costs.) if upon the construction of the 25 Geo. 3. c. agent such 44. the Court should be of opinion, that the plaintiffs were policy is void by 25 not entitled to recover.

The cause was tried before Buller, J. at the Sittings after Geo. 3. c. last Easter term, at Guildhall; when it appeared, that the Whether an plaintiffs lived in Georgia, and had formerly been owners of agent effectthe vessel, but before May 1785 had transferred their proper-ing a policy the vessel, but before May 1785 nad transferred their property in her to one Pierce who resided in the same country. The cipal resinames of the plaintiffs were at the head of the policy, which ding abroad, was under-written by the defendant in September 1785; and must not rethe declaration stated that they had made it for the benefit of side in En-Pierce, in whom the interest was averred to be.

These were all the facts which were material in the present was after-

case; and upon these two questions arose.

1st, Whether, when an agent effects a policy for his principal residing abroad, the act of the 25 Geo. 3. c. 44. requires c 56. See that such agent's name should be inserted, eo nomine, as agent? post. p.

2dly, Whether under the same act it is necessary that such 464.] agent, who effects the policy for his principal residing abroad,

should himself reside in England.

Erskine, Mingay, and Law, shewed cause against the rule

for setting aside the verdict.

From the rigour of the act with respect to foreigners, and the additional impediments which it throws in the way of commerce, the Court in their construction of it will lean as much as possible against the objections which have been taken. As far as respects the present plaintiffs, it operates as an expost facto law; no time having been allowed, as has been usual in acts which relate to general commerce, for foreigners to be apprized of the effects of the law, or of the alteration in the commercial policy of the kingdom; and, at the time that the insurance was effected, the plaintiffs had no notice of such an act.

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As to the 1st objection, the intention of the Legislature does not appear by the words of the act to have been that, in case the principal resided abroad, the agent's name should be inserted, eo nomine, as agent: nor is such intention to be collected from the preamble, which only recites that it was meant to guard against mischiefs which had arisen from effecting policies in blank, and the act itself only guards against those. Therefore as the name of the person effecting the policy does in fact appear upon the face of it, the provision of the act is satisfied. The second clause of the act declares that, in case the principal does not reside in England, the name of his agent effecting the policy shall be inserted; but that is only descriptive of the person, and not of his character. The agent in this clause is not used in the same sense as it is in the first.

With respect to the 2d objection, there are no words in the statute to warrant the construction contended for, that the agent who effects the policy must himself reside in England. It is not recited in the preamble that inconveniencies had arisen from permitting persons to effect policies who resided out of the kingdom; and this regulation being restrictive of a commercial usage of long standing, the Court will construe the words strictly: and the words themselves only amount to this, that, if the principal himself does not reside in England, , the policy shall be effected by his agent, but the act does not go on to require that such agent should necessarily reside in

England.

Besides, if there had been any real ground for either of these objections, the defendant has precluded himself from taking any advantage of it, by entering into the contract; as it is competent for any man to wave an advantage which the

law gives him.

The counsel on the other side were stopped by the Court. Lord Mansfield, Ch. J. Whatever doubts I may have in my own breast with respect to the policy and expedience of this law, yet, as long as it continues in force, I am bound to see it executed according to its meaning; and however I may think that this is not a commendable defence in the under-writer, yet that is a matter for his consideration and not for mine.

I have not a particle of doubt as to the true construction of this act. Let us consider what are the mischiefs intended to be remedied, and the provisions of the act for remedying them. The preamble recites that great inconveniencies had arisen from

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from omitting to insert in policies of insurance the names of the persons for whose benefit or on whose account such policies were effected. This is the mischief; and it is remedied by enacting that if the principal resides in England, his own name shall be inserted, or, what amounts to the same thing, the name of his agent eo nomine, as agent for him. If the agent were not to be named in the policy in the capacity of agent for the insured, the public would still be left ignorant who the insured was; and the principal intention of the act would be defeated. Then as to the case of the insured living abroad, who cannot insure in his own name, there can be no doubt but that the name of his agent must be inserted, eo nomine, as agent.

I am also strongly inclined to think that the other objection with regard to the residence of the agent is good; but it is

not necessary to give a direct opinion on that point.

As to the hardships upon foreigners; if they enter into contracts in *England*, and apply to our courts of judicature to enforce a performance of them, they must submit themselves to be judged by the laws of this kingdom, and to our

exposition of them.

BULLER, J. It seems to me to have been the intention of the Legislature that the name of the agent, who effects the policy for his principal residing abroad, should be inserted in the policy, qua agent for such person. For the word "agent" in the second clause is to be understood in the same sense as a taken in the first. And I have as little doubt that the meaning of the act is that such agent should reside in Great Britain.

Per Cur.

Rule absoluter

1786.

Wednesday, June 28th.

## The KING against JOHN FEARNLEY.

Upon a de-HIS was a demurrer to an indictment. murrer to West-Riding ) At the General Quarter Sessions of the peace an indictment found of Yorkshire, of our lord the King, holden at Knaresborough, in an inferi-In and for the West-riding of the county of or court obsections may York, on Tuesday the 4th day of October, in the 25th year, &c. be taken, as before, &c. that same sessions of the peace is adjourned by the justices aforesaid until Thursday the 6th day of July aforewell to the jurisdiction said, in the year aforesaid, at ten of the clock in the forenoon of such of the same day, to be holden at Leeds in and for the Riding court, as to the subject aforesaid, to do farther as the Court there shall consider, &c. matter of And on the said Thursday the 6th day of October aforesaid, in such indictment. And the year aforesaid, the same general Quarter Sessions of the peace is holden by the adjournment aforesaid at Leeds aforewhere the caption of said, in and for the said Riding, before, &c. at which said genthe indicteral QuarterSessions of the peace, continued and holden by the ment states the court of adjournment aforesaid, at Leeds aforesaid, in and for the said quarter ses- Riding, on the said Thursday the 6th day of October aforesaid, sions, where in the year aforesaid, before the justices last named, on the such indictoaths of &c. It was presented as followeth, (that is to say) ment was West-Riding) THE jurors for our lord the king, upon their found, to oath, present, that Sarah Firth of the townhave been of Yorkshire, held on an ship of Checkheaton, in the West-Riding of **Impossible** day, it is fa-the county of York, spinster, before the making of the order tal. Where of justices herein after mentioned, to wit, on the 11th of an allow-September 1784, at the township of Checkheaton aforesaid, ance is ordered to be was delivered of a female bastard child; which said bastard made week-child, at the time of the making of the order, and also at the ly to a pau-time of the contempt and disobedience herein after mentioned, per, it is due at the begin was, and yet is, living, to wit, at the township of Checkheaton ning of the aforesaid. And the jurors aforesaid, upon their oath aforesaid, week. further present that the said Sarah Firth, having such bastard child as aforesaid, the said Sarah Firth, on the same day and year aforesaid, at Checkheaton aforesaid, became and was very poor and impotent, and not able to provide for herself and her said bastard child. And the said Sarah Firth so being very poor and impotent, and not able to provide for herself and her

said bastard child as aforesaid, she the said Sarah Firth, after-

wards

wards, to wit, on the same day and year aforesaid, at the 1786. township of Checkheaton aforesaid, applied to the then overseers of the poor of and for the township of Checkheaton afore- The King said for relief; and that the then overseers of the said poor, against and each and every of them, then and always afterwards did wholly neglect and refuse to relieve the said Sarah Firth, so being very poor and impotent as aforesaid, to wit, at the township of Checkheaton aforesaid. And the jurors aforesaid upon their oath aforesaid, further present that the said Sarah Firth so being very poor and impotent, and not able to provide for herself and her said bastard child, after such neglect and refusal as aforesaid, to wit, on the same day and year aforesaid, at the township of Checkheaton aforesaid, appeared before H. Wood, doctor of divinity, and W. Walker, Esq. two of his Majesty's justices, &c. and then and there before the said justices, took her corporal oath, and did depose that she the said Sarah Firth was very poor and impotent, &c. and that she had then lately applied for relief to the overseers of the poor of the said township, and was by them the said overseers refused to be relieved. And the jurors aforesaid upon their oath aforesaid, further present that the said H. Wood and W. Walker, &c. did thereupon afterwards, to wit, on the same day and year aforesaid, at the township of Checkheaton aforesaid, duly summon the said overseers to appear before them, and shew cause why relief should not be given to the said Sarah Firth. That the said overseers, having been so summoned, did, before the said justices, refuse to relieve the said Sarah Firth, and did not shew to the said justices any sufficient cause why relief should not be granted to the said Sarah Firth; and that the said H. Wood and W. Wulker, so being such justices as aforesaid, did thereupon afterwards, to wit, on the same day and year aforesaid, at the township of Checkheaton aforesaid, make their certain order in writing, signed with the proper hands, and sealed with the seals of the said H. Wood and W. Walker, so being such justices as aforesaid; whereby, after reciting that the said Sarah Firth had made oath unto them the said H. Wood and W. Walker, two of his Majesty's justices of the peace for the said Riding, that she the said Sarah Firth was very poor and impotent, and not able to provide for herself and her bastard child; and that she the said Sarah Firth had then lately applied for relief to the overseers of the poor of the said township, and was by them refused to be relieved; and after reciting also that the over-Vol. I.

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1786. seers of the poor of the said township had been duly summan.

ed to shew cause why relief should not be given to the said So-The King rah Firth, but had refused to relieve her with sufficient relief. against and had not shewn any sufficient cause why relief should not be granted to her, they, the said H. Wood and W. Walker, did thereby order the church wardens and overseers of the poor of the said township, or some of them, to pay unto the said Sarah Firth the sum of one shilling and sixpence weekly and every week, for and towards the support and maintenance of her and her bastard child, until such time as they should be otherwise ordered, according to law, to forbear the said allowance. And the jurors aforesaid, upon their oath aforesaid, further present that one John Fearnley, late of the township of Checkheuton, in the said West-Riding of Yorkshire, clothier, on the 11th day of September, in the said year 1784, and long before, and afterwards, was one of the overseers of the poor of and for the township of Checkheaton aforesaid, having duly accepted the said office, to wit, at the township of Checkheaton aforestaid; and that it was then and there the proper office and duty of the said John Fearnley, as such overseer as aforesaid, well and faithfully to execute and obey the said order of the said H. Wood and W. Walker, so made as aforesaid, according to the exigency thereof. And the jurors aforesaid, upon their oath aforesaid, further present that the said order of the said H. Wood and W. Walker, so made as aforesaid, afterwards, to wit, on the same day and year aforesaid, at the township of Checkheaton aforesaid, in the Riding aforesaid, was duly shewn and delivered to the said John Fearnley, so being such overseer as aforesaid, to be by him well and faithfully executed and obeyed in all things according to the exigency thereof, and according to the said office and duty of the said John Fearnley, as such overseer as aforesaid. And the jurors aforesaid, upon their outh aforesaid, further present that the said John Fearnley, so being such overseer as aforesaid, and so having seen and received the said order as aforesaid, afterwards, to wit, on the said 11th day of September in the said year 1784, and continually from thenceforth for and during all such time as the said John Fearnley continued in his said office of overseer of the poor of the town of Checkheaton aforesaid, unlawfully, wilfully, obstinately, and contemptuously, did neglect and refuse, and hath wholly hitherto neglected and refused, to pay unto the said Sarah Firth, the sum of one skilling and six pence, or any part thereof, weekly and towards the support and maintenance of her the said Sarah Firth and her bastard child as by the said The Kind order he the said John Fearnley, as such overseer as aforesaid, was required to do; and the same and every part thereof is still wholly due and unpaid to the said Sarah Firth, although he the said John Fearnley hath not at any time whatsoever hitherto been otherwise ordered, according to law, to
forbear the said allowance, contrary to the said office and duty;
Sc.

Fearnley in support of the demurrer.

1st, Every caption of an indictment must shew that it was taken before a court having a competent jurisdiction. 2 Hawk.

P. C. 253. The caption of this indictment states, that the sessions were held on Tuesday the 4th of October, in the 25th year of the reign. Sc. and then it states that the same sessions were adjourned till Thursday the 6th day of July aforesaid; therefore the court, before which this indictment was found, was held without an adjournment, and had not a competent jurisdiction.

Another objection was taken; that it appeared that the order of justices was made on the 11th of September, and on the same day it was shewn and delivered to the defendant; but the indiot ment did not state that the money was demanded either before or after it was due. As the refusal to pay constitutes the essence of the charge, a demand and refusal ought to have been stated. Besides, the money was ordered to be paid weekly and every week; therefore the defendant could not have been guilty of any disobedience before the expiration of the first week; but it is not averred that the woman was alive at the end of the week. And he cited the King against Morehouse, Tr. 25 G. 3. B. R.

Law, centre. This being a demurrer to an indictment, no edvantage can be taken of any want of form in the caption. But if the court should be of opinion, that, in this stage of the prosecution, any such objection may be taken, the present one is not well founded, because enough appears on the caption itself to shew that the sessions were adjourned till Thursday the 6th day of October. For though in the former part of it the word "July" is erroneously inserted, yet immediately afterwards it is stated "that on the said Thursday the 6th day of October aforesaid, in the year aforesaid, the same general quarter-sessions of the peace is holden by the advancement aforesaid." But

The

1786. against FEARNLEY.

The Court were of opinion that this was a good objection; because by the caption of the indictment it appeared that the The King Court of quarter sessions had no jurisdiction. Upon a demurrer to an indictment, the court must look to the whole record to see whether they are warranted in giving judgment on it; and therefore it is open to objections as well to the jurisdiction of the court where the indictment is found, as to the subject matter of the indictment.

On the other point the Court were of opinion that the sum, which was ordered to be paid weekly, was due at the beginning of the week; but, as to whether a sufficient demand was stated to have been made in this case, they gave no opi-Judgment for the defendant.

nion.

Wednesday, June 28th.

The KING against SAMUEL HALL.

Where a conviction by a justice is grounded upon an information taken at a time past, such conviction may inf rmer tice to be in formed, in the preterperfect tense. offender • should be charge before any evidence in support of it is given ; but if the evide--ce be given first, though not in his pre-

**se**nce, and

HIS was a conviction on the 22 Car. 2. c. 1. Parts of Kesteven, in the ) BE it remembered, that on the 2d day of March, in the 26th year of county of Lincoln. the reign, &c. at New Sleaford, in the parts of Kesteven aforesaid, and county aforesaid, Robert Benson, clerk, came before me Richard Brown, Esq. one of the justices of our said Lord the King, &c. and gave me, the said justice to understate that the stand and be informed, that one Sumuel Hall, carpenter, being the occupier of a certain dwelling-house, situated in the pagave the just rish of Heckington, in the parts and county aforesaid, did, on the 26th of February now last past, at the parish of Heckington aforesaid, wittingly and willingly suffer a meeting and unlawful assembly of divers persons to be held in his said dwel-The ling-house, for the exercise of religious worship in other manner than according to the liturgy and practice of the church of England, between the hours of one and eight o'clock in plead to the the afternoon of the same day; at which meeting and unlawful assembly five persons and more were assembled together, over and above those of the said Samuel Hall's household, ) the dwelling-house in which the said meeting and unlawful assembly was held not being certified to the bishop of the diocese, or to the archdeacon, of that archdeaconry, or to the justices of the peace at their general or quarter sessions of the peace for the parts and county in which the said meeting was held, nor registered in the said Bishop's or archdeacon's court, nor he confess the

offence, the irregularity is cured. Where the prosecutor is not obliged to negative the exceptions in a statute, and negatives some of them only, that part of the information will be rejected as surplusage (a).

(a) Vid. R. v. Jefferies, post. 4 vol. 767.

against

HALE.

nor recorded at the said general or quarter-sessions) against the form of the statutes in such case made and provided, whereby the said Samuel Hall hath forfeited the sum of 201. The King to be distributed as the law in this case directs. And now, on the 6th day of the said month of March, in the twentysix year, &c. at &c. came the said Samuel Hall before me the said justice, in pursuance of my summons issued in this behalf; when the said information, together with the examinations in writing of Joseph Wilkinson and Joseph Chamberlain, both of Heckington aforesaid, two credible witnesses, taken upon their respective corporal oaths before me the said justice, being openly read, which said examinations set forth, that on the said 26th day of February the said Joseph Wilkinson and Joseph Chamberlain went to the dwelling-house of the said Samuel Hall, at Heckington aforesaid, and found a great number of people assembled at the said dwelling-house of the said Samuel Hall, and that one Joseph Merryweathers was preaching to the said assembly; that the said dwelling house, at which the said meeting and assembly was holden, was not certified or registered as by law required; and that they also saw there Peter Jarvis, John Taylor, William Taylor, and Robert Bowles, all of the said parish of Heckington, attending the said meeting; and the said Samuel Hall being now here required by me to answer the premises, he the said Samuel Hall pleadeth and confesseth the offence charged upon him in and by the said information; wherefore, &c. he hath forfeited 20%.

Bearcroft took several objections to this conviction. 1st, The information is not in the present tense. It is stated that the informer came before the justice, and gave him to In 2 Ld. Raym. 1376, and Stra. 608, a understand, &c. conviction was quashed, because the record was that the witness "præstitit sacramentum" instead of "præstat."

2dly, It appears that the evidence was not given in the preseace of the defendant, which it ought to have been. defendant should have been called on to plead to the charge before any evidence was received; but instead of that, the justice read over improper evidence, which should not have been given, and then called on the defendant to answer the premises, by which means the defendant was confounded and induced to plead guilty.

3dly.

Sally, Though this is charged as an offence against the stat: 22 Car. 2. only, yet it concludes contrary to the form of the The KING statutes, which is fatal. 2 Hawk. P. C. 252.

ar airet HALL.

4thly, The information does not contain a charge within the stat. of the 22 Car. 2. c. 1. upon which the justice professes to convict. An information, on which a conviction is to be founded, must be as certain as an indictment. Now though this information professes to set out an offence against the 22 Car. 2. yet it is not confined to that statute only, but negatives several exceptions in the stat 1 W. & M. c. 18. Therefore though it were not necessary for the prosecutor to negative any of the exceptions under the latter act, yet having undertaken so to do, the omission of any one is fatal. The information has negatived those in the 19th clause of the 1 W. & M. c. 18. but has omitted that in the 3d section of the same statute; for it is not stated "that he did not take the "oaths, and subscribe the declaration. &c." by which he would have been indemnified.

Balguy, in support of the conviction, was stopped by

The Court; who said, that however inclined they were to listen to any trivial objections to such a prosecution, yet none

of the present were sufficient in point of law.

As to the 1st, they said that the words objected to were better in the past than in the present tense; because they referred to a time past, namely the time of making the inform-

The 2d, is cured by the defendant's having pleaded guilty. As to the 3d and last. This is a conviction on the 22 Car. 2. therefore the prosecutor need not have negatived any of the exceptions in the stat. 1 W. & M. c. 18; and they may be rejected as surplusage. For if a subsequent statute make an exception to a former one, it is incumbent on the defendant to shew, by way of defence, that he comes within such exception.

And besides, the 13th section of the 22 Car. 2. directs "that this act, and all clauses herein contained, shall be " construed most largely and beneficially for the suppressing " of conventicles, &c. and that no record, warrant, or mitti-" mus to be made by virtue of this act, or any proceedings

"thereupon shall be reversed, avoided, or any way impeach-" ed, by reason of any default in form.

Conviction affirmed.

NUTT

1786,

NUTT and others Assignces, &c. of EDWARD HAGUE Thursday, a Bankrupt, against BOURDIEU. June 29th.

THIS was an action on a policy of insurance, made by Barratry can Hague before he became a bankrupt, on goods laden on only be comboard the ship hachette, (otherwise the Bellona,) for a voyage against the from London to Rochelle, subscribed by the defendant on the owner of the 27th October, 1769, for the sum of 120l. at 1l. 10s. per cent. ship, and without his consent.

The defendant pleaded the general issue.

This cause came on to be tried at the Sittings after last Easter Term at Guildhall, before Buller, Justice, when the jury found a verdict for the plaintiffs, damages 93l. 6s. 8d. and costs 40s. subject to the opinion of the court on the following case.

That the defendant underwrote the policy stated in the de-

claration for the sum of 1201. at 11. 10s. per cent.

That the bankrupt shipped on board the vessel in question

goods to the amount of 1800l. for Rochelle.

That the captain, by the instigation and direction of Messrs. Le Grands, the owners of the ship, went with the ship and cargo to Bourdeaux, instead of Rochelle, where the cargo was

sold by the agents of Le Grands.

That a petition was presented by the plaintiffs to the lieutenant-general of the admiralty of Guienne, stating, That in October 1769 Joseph Le Grand, one of the partners of a mercantile house at Rochelle, being at London, with a ship named La Rachette or Bellona, and in want of money to make up a cargo to return home, applied to the house of Messrs. Hague to supply them therewith. That they agreed to supply them with the cargo required; and thereupon they loaded on board the said ship, for account of the said Messrs. Le Grands, 265 casks of train oil, 4 casks of indigo, and 3 bales of merchandize. That as the said Messrs. Hague did not know the said house of Le Grands sufficiently to entrust them with merchandizes of such value, without a security, therefore on the 26th of October aforesaid, they entered into a contract with them the said Joseph Le Grand and captain Rene Guine at London, whereby it was agreed that the bills of lading for the said merchants should not be delivered to the said Messrs. Le Grands, but at Rochelle, the place of the said ship's destination, and until they should have paid for the same

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against
BOUR DIEU

to the bearer of the said Messrs. Hague's orders in bills of exchange at three and four usances, duly accepted by Messrs. Dufour Mallet and Co. bankers at Puris, or some other merchants of responsibility, and approved by Messrs. Hague, for the amount of the merchandizes, together with charges and premiums of insurance, and those of lading and other expences to be incurred by the said Messrs. Hague, relative to the forwarding of the said merchandizes; and in default it was expressly agreed, that the said merchandizes were to be received for account of the said Messrs. Hague by the bearer of their orders free from freight, and all other charges of conveying them from London to Rochelle, and for which the said Guinè, captain of the said ship, was only to have his recourse against the said Messrs. Le Grands.

That the said captain Guine, in pursuance of the said contract, did, on the 27th of the said October, deliver the bills of lading to Messrs. Hague, who on the same day forwarded the same to the order of Mr. Rodrique at Rochelle, together with the said contract by the post, desiring him to receive for their account the oils and indigo of which the cargo was composed, upon the arrival of the said ship, or to deliver the whole to the house of the said Messrs. Le Grands, provided they fulfilled the clauses and conditions to which

they had agreed, and not otherwise.

That the said Joseph Le Grand embarked with the said captain Guine in the said ship, and arrived at Rochelle harbour, but, instead of entering the port, they cast anchor before St. Martin de Rhe; and, Le Grand being put on shore, he got secretly into the city, where, having consulted with his said partners the means of rendering ineffectual the precautions taken by Messrs. Hague, he returned on board and got the captain to sign other bills of lading fraudulently and contrary to those delivered at London to Messrs. Hague, and of which the said Mr. Rodrique was actually bearer.

That among a number of differences which distinguished the two bills of lading was the following: That by the bills of lading delivered at London to Messrs. Hague, and by them forwarded to Rodrique, the captain was obliged to go directly to Rochelle; and by that made before St. Martin de Rhè, he reserved to himself the liberty of putting into Ro-

chelle or Bourdeaux.

The

Nutt

The petition then proceeded to state that the captain, forgetful of his prior engagement, and the duty of his employ, put into Bourdeaux on the 2d of December.

That, by means of these false bills of lading, and by the Boundary. contrivance of Le Grand and the captain, the goods were got

on shore, and put into the hands of Le Grand's agents.

That, as soon as the report of the ship's having arrived at Bourdeaux had reached Rochelle, Rodrigue, who was the bearer of the contract made by Le Grand with the house of Hague, bearing date 26th of October, 1769, and of the original bill of lading of the cargo of the Bellona, applied to the house of Le Grand, who, after acknowledging the fact of the ship's having arrived at Bourdeaux, drew a bill of exchange on Messrs. Bommin and Lussaud, dated 8th December 1769, for the whole amount of the sum advanced by Hague to make up the cargo. That this bill however was not accepted; whereupon Rodrique procured the cargo to be attached in the hands of the several persons who held it.

That, in the mean time, Hague having in vain attempted to recover the loss from the under-writers in England, on account of the barratry of the master, stopped payment.

That on the 8th March 1770, the house of Messrs. Le Grands delivered in all their accounts at the registry of the Consulate at Rochelle, omitting to insert this debt to Hague, which omission they had afterwards endeavoured to supply by a supplemental account, dated 13th August 1771. But that the account, when delivered in, was full of error and fraud; upon the faith of which supposed account however they had treated with their other creditors, and had got their agreement allowed by the parliament of Paris, by arret, upon a petition of the 13th February 1772; in consequence of which, a releasement was granted to them of all attachments and executions, and an injunction to all persons, arresting any of their effects, to return them into their hands.

That it was to remedy this atrocious conduct of the house

of Le Grands that the petitioners applied, &c.

The petition concluded by stating the proofs of the plaintiff's title to the sum claimed on account of the cargo.

That, in consequence of the above petition, a decree was made on the 22d August 1775, by John Baptist Raymond Nabarre, counsellor in parliament, and lieutenant-general of the Vol. I. Uu admiralty. Nurt.

admiralty, and others, at Bourdeaux; which after stating the petition and the evidence produced in support thereof, is as follows:

We, doing justice to the parties, have declared, and do deBourdiss. We, doing justice to the parties, have declared, and do declare, the contumacy laid against the said Rene Guine to be
well and duly founded, and for the compensation thereof have
declared him, and do declare him, guilty and convicted of
the crime of barratry of the master, for having signed false
bills of lading in order to change the voyage of the said ship
the Rachette or Bellona, and contrived to carry away the merchandizes of which the cargo consisted, and of having effected
the said barratry in bringing the said ship into the port of this
city, contrary to the tenor of the bills of lading which he had
delivered to the said Hague; for reparation whereof we do
condemn the said Rene Guine to perpetual service on board
the king's gallies, &c.

We do likewise declare the said Dominique Le Grand guilty and convicted of having been an instigator and accomplice of the said barratry of the master, in causing the said captain to sign some false bills of lading to alter the said ship's voyage, with an intent to carry away the merchandizes of which the said cargo consisted, and of having effected the said robbery in causing the said ship to be brought into Bourdeaux, wherefore we do condemn the said D. Le Grand to serve the king

on board his gallies for five years, &c.

We do also condemn the said Rene Guine and Dominique Le Grand jointly and severally to pay unto the said Nutt, Smith, and Rolleston, in behalf of whom they act, the sum of 42,270 liv. 4 sols, 7 den. conformable to the bill of exchange drawn in the name of Le Grand, father and son, to the order of Mr. Michel Rodrique, on the said Bommin and Lussaud, for the amount of the merchandizes furnished by the said Hague to make up the cargo of the said ship the Rachette or Bellona.

The captain and Le Grand were also condemned in all char-

ges, expences, and in interest, &c.

The question for the opinion of the Court is, whether the

plaintiffs are entitled to recover?

Smith contended, on the part of the plaintiffs, that the fraudulent conduct of the master amounted to barratry. To prove this, he had recourse to the several definitions of the word barratry," as given by all the writers upon commercial law, by whom it is explained to be "fraus, dolus, vel deceptio." Molloy considers malpractices against the cargo as amounting

Nort

to barratry; and Postlethwayte (a) says, that "barratry is where the master or mariners cheat the owners or insurers. whether by running away with the ship, or by embezzling the cargo;" and above all Lord Mansfield in the case of Vallejo Boundary and Wheeler (b), laid down this broad description of it, that " whatsoever is by the master a cheat, a fruud, a cozening " a trick, is a barratry in him;" and added, that " nothing " could be so general." Therefore the cargo in this case having been embezzled by the fraud of the master, it amounted to an act of barratry in him. He was guilty of a crime in the first instance, in going to Bourdeaux instead of Rochelle; and even if he had gone into the port of Rochelle, and had made a false delivery of the goods to any other person than the proper cohsignee, he would have been guilty of barratry. It can make no difference that the owner of the ship was on board all the time. He was an entire stranger as to the cargo. This intervention could not vary the relative situation of the other parties: the captain was not bound to follow his directions; for, by the agreement with Hague, Messrs. Le Grands had parted with their interest in the ship for that voyage. had the sole use of her, and had fixed her destination, and must be considered as the special owner of her during the coh. tinuance of the agreement. Therefore, as he was not privy to the fraud of the master, he is entitled to recover against the underwriters in the character of owner of the ship. actual conveyance is necessary in order to transfer the ownership of a vessel; it is sufficient for the present purpose, if Hague had the sole occupation of her, and acted ostensibly It was determined in the case of Vallejo and Wheeler that the act of the captain amounted to barratry, because his going to Guernsey to take in wine was without the knowledge of Darwin the freighter, who was considered to have such an ownership in the vessel for that voyage as to enable him to recover as for a loss by barratry committed against him by the master. In arguing that case, a distinction was taken between a general ship, and one that is let to freight to a single person only. This case must come within the latter description; for though there was no charter party, yet that makes ho difference; for a charter party is nothing more than a contract to have the exclusive use of a ship for a particular voyage, which is exactly the case here.

(a) 1 Postlet. Tit. Barratry.

(b) Cowp. 154.

NUTT

against

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The court in France, which had a competent jurisdiction to decide such a question, have already determined that this was barratry in the master; and this court, who are to pass judgment upon the same facts, will not readily determine otherwise. As to the reparation which was ordered to be made by that sentence, whether any benefit can ever be derived from it, or not, cannot vary the question between these parties, or divest the right of the plaintiffs to recover against the underwriters at home; for that was a criminal prosecution, and the sum adjudged was more in the nature of a penalty for gross misconduct in Messrs. Le Grands, than an adjudication upon acivil contract; and the judges who pronounced that sentence of condemnation could never intend thereby to set aside a fair contract entered into by other parties.

This being avowedly a fraud, and gross misconduct on the part of the master, the additional circumstance of *Le Grand's* being privy to it, will rather aggravate than diminish the

master's criminality.

S. Heywood, for the defendant, went upon the distinction which different countries in Europe make in their definition of barratry. In France barratry is any neglect whatsoever on the part of the master; but in England the act must partake of the nature of a crime to constitute barratry. In 2 Val. 80. two instances are mentioned, where the assured cannot recover as for a loss by barratry; 1st, where the owner of the ship acts as master; 2dly, where the master himself is the assured.

In considering whether the conduct of the master stated in this case be barratry or not barratry must be taken in the same sense in which it is used in English policies of assurance; and according to our signification of the word, barratry must be committed against the owners. It is said indeed, that Hague must be considered as the owner of the ship pro hac vice: but the last words of the agreement are decisive against such a construction; for it was a conditional sale of the cargo to Messrs. Le Grands, and in default of their paying for it in the stipulated manner, Hague was to pay no freight or other charges of conveyance, but the captain was to have his remedy against Le Grand alone. So that Hague had merely the use of the ship, and not the possession or direction of her, In Vallejo and Wheeler, the ship was chartered to Darwin, by which means he was to all intents and purposes the owner of the ship for that voyage. It was there argued, that if a ship

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ship be let out to freight to a single person, the freighter is owner for that voyage: but if there be only a covenant to carry goods, the real owner of the vessel has the direction of her, and the hiring of the master and mariners. This was nothing more than a mere undertaking to carry the goods of Bourster. Hague to Rochelle. And according to the doctrine in Stamma and Brown (a) when a merchant had shipped goods on board a general ship, and the captain has deviated with the consent of the owners of the ship, that was held not to be barratry, so as to entitle the owner of the goods to recover against the underwriter. In 2 Chan. Cas. 238. it was held that the owner of the ship is not liable for the barratry of the master; for which reason barratry is insured against, but deviation is not. In barratry, the captain must commit a fraud upon his owner: but, if the owner be guilty, it then ceases to be barratry, and becomes some other crime for which he is answerable to the party injured. There can be no doubt in this case against whom the fraud was committed. There was no relation between the master and the freighter. The former acted under the direction of the owner of the vessel, and therefore cannot be said to be guilty of a fraud against him; in which case only an insurer can be liable as for barratry. For all species of embezzlements by the master or mariners to a certain amount the owner of the ship is liable by 7 Geo. 2. c. 15. a fortiori, if he himself is consenting to it: and the underwriter is only answerable for those acts of fraud, for which the owner is not: but where goods are lost or spoiled by the default of the master, the owner is liable in respect of the freight. Boson v. Sanford and others, Salk. 440. In the case of Lewen and Suasso (b), Lord Hardwicke said, " Barratry is an act of "wrong done by the master against the ship and goods."

The Court, on this day, ordered another argument; and Lord MANSFIELD, Ch. J. said that with regard to the sentence which had been passed abroad, and which declared the master and owner to have been guilty of barratry, it was entirely out of the question. That though it was a most righteous judgment; yet that it was no part of the consideration of the Court there, what was meant by barratry in an English The question was left entirely open. That their idea of barratry was manifestly different from the construction put upon that word in our own courts, for they had found the owner guilty of barratry, which was entirely repugnant to every definition of barratry which had ever been laid down in an English court of justice.

A few

NUTT against BOURDIEU.

A few days afterwards the Court declared that they had not the smallest doubt as to the present question, and therefore thought it very unnecessary to hear a second argument. Accordingly,

Lord MANSFIELD, Ch. J. delivered the opinion of the court. All questions upon mercantile transactions, but more particularly upon policies of insurance, are extremely important and ought to be settled. The general question here is on the construction of the word barratry in a policy of insurance. It is somewhat extraordinary that it should have crept into insurances, and still more that it should have continued in them so long; for the underwriter insures the conduct of the captain (whom he does not appoint, and cannot dismiss,) to the owner who can do either.

The point to be considered is, whether barratry, in the sense in which it is used in our policies of insurance, can be committed against any but the owners of the ship? It is clear beyond contradiction that it cannot. For barratry is something contrary to the duty of the master and mariners, the very terms of which imply that it must be in the relation in which they stand to the owners of the ship. The words used are master and mariners, which are very particular. An own. er cannot commit barratry. He may make himself liable by his fraudulent conduct to the owner of the goods, but not as for barratry. And, besides, barratry cannot be committed against the owner with his consent: For though the owner may become liable for a civil loss by the misbehaviour of the captain, if he consent, yet that is not barratry. Barratry must partake of something criminal, and must be committed against the owner by the master or mariners. In the case of Vallejo and Wheeler the Court took it for granted that barratey could only be committed against the owner of the ship. The point is too clear to require any further discussion.

Postea to be delivered to the defendant.

Buller, J. took notice of some mistake in the statement of the case of Vallejo and Wheeler as reported in Cawper, which, he said was easily amended by stating that the vessel was char-

tered by Brown to Darwin, instead of by Darwin to Brown.

That Brown having likewise acted as captain of the ship

had probably been the occasion of the mistake.

And that, when the case was read with this alteration, it would be found to decide the present question.

The

## The KING against The BISHOP of LONDON.

Thursday, June 29th.

BEARCROFT had obtained a rule last term to shew cause The Court why a writ of mandamus should not issue directed to the will not defendant, commanding him to license John Hutchins, clerk, mandames to preach as afternoon lecturer of the parish church of St. to a bishop Ende, Chelsea, pursuant to his election.

This rule was enlarged at the beginning of this term, in lecturer, without the

order to make Mr. Cadogan, the rector, a party to it.

The application was founded on several affidavits, which the rector, stated that there had been, time immemorial, a right and cus. where such tom in the said parish for the parishioners to have and supported port, by voluntary contribution, a lecturer to preach in the said by voluntary parish church on Sundays in the afternoon, and that it had contributibeen the custom of the parishioners, time immemorial, to no- an immemorial and elect such lecturer by public and epen poll of the rial custom inhabitants paying scot and lot in the said parish in the vestry to elect room, previous notice of such election being given in church without such consent be a sunday preceding.

That previous to the year 1708, there was no entry to be found in the parish books relative to the loctureship, they

having been lost or destroyed, as was believed.

That the following entries were taken from the parish mimite-book;—"Thursday, July 1st, 1708. It is also ordered is at the same vestry that they will proceed to the choice of a fecturer in the room of Mr. Standish, lately deceased, on Sanday next, at six in the evening; and that notice thereof

" be given in the church in the morning, &c.

\*\* According to an order at our last meeting, on the 4th instant, we are now met in a vestry to make a further scrutified by, who are proper electors; and do now affirm that the imajority was for Mr. Hugh Shorthouse, to be our lecturer; and therefore do, in the presence of us, the church-wardens and overseers and the rest of the parishioners now present, declare and attest the same."

That it appeared by the said book of entries, from the year 1908 to the present time, that there had been lecturers chosen by the inhabitants householders of the said parish in regular saidcession upon vacancy by death or resignation of the former-

lecturer.

lecturer. That the reverend William Williams clerk, the late I lecturer of the said parish, on or about the 23d February The King 1786, regularly resigned the said lectureship. That on the The Bishop 7th March last after notice given on the 28th of February of LONDON, preceding, the inhabitants proceeded to an election in the usual manner, when Mr. Hutchins was chosen, &c.

Mingay now shewed cause against the rule, and read from an affidavit the following entry, extracted from the registry of the Consistory Court of London; "We, whose names are "hereunder written do declare, that Mr. Hugh Shorthouse " was fairly and duly elected to be lecturer of the parish church " of Chelsea, on the 4th day of this present July; and there-" fore we do, humbly request the Right Reverend Father in "God, Henry, Lord Bishop of London, that he would be " pleased to give him a license to officiate as lecturer in the " said parish church of Chelsea. Witness our hands, this 8th "day of July, 1708, (signed by the church wardens, over-" seers and constable.")

After which followed ; " Mr. Hugh Shorthouse stood with " my consent for lecturer of Chelsea, and was, as is above spe-"cified, chosen by a majority on the 4th day of July last. "Witness my hand this 21st of August, 1708. John King,

" rector of Chelsea."

He contended that it appeared from the above extract that, in the very instance relied on, the consent of the rector had

been obtained, before the bishop granted his license.

Unless there be an endowment or an immemorial custom to appoint without the consent of the rector, the Court will never grant a mandamus to the bishop to license, till such consent is obtained. 2 Stra. 1192. 1 Wils. 11. This was not an endowed lectureship, because it appeared from the affidavits that the lecturer has been supported by voluntary contributions. It would be nugatory in the bishop to grant such a - license, unless the consent of the rector were obtained, or un. less it were warranted by immemorial custom, because the rector might maintain trespass against the lecturer for using his pulpit, even though he should be licensed; for a license forms no part of the title of a lecturer, it only exempts him from the penalties in the 13 & 14 Gar. 2. c. 4.

He mentioned a case between the church-wardens of St. Leonard's Shoreditch, and doctor Denn, in the ecclesiastical court, in the year 1758, where doctor Denn the rector of the parish entered a caveat against the Rev. J. Day's being licensed, who had been elected by the parishioners to the office of lecturer, and the license was afterwards refused; because the rector did not consent.

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Bearcroft and Erskine, contra, insisted upon the right of the "g inst parishioners to make such an appointment; for the affidavits of box por. expressly state an immemorial custom in them to choose a lec-This custom is supported by entries as far back as the records of the parish reach. Prima fucie these are strong evidence of such an immemorial custom; and if these facts were put in issue on record, it would be incumbent on the other party to impeach them by contrary evidence. It is sufficient for the party applying to state a right in themselves, without negativing the right of any other person. As to the consent which is supposed to have been given by the rector in 1708 to the election of Mr. Shorthouse, it does not appear by the entries that such consent was certified to the bishop before he granted his license. The case of doctor Denn is not applicable here, because the custom of another parish will not govern this. The stat. 13 & 14 Cur. 2. c. 4. does not require the consent of the rector.

But even supposing this right to be left doubtful upon the affidavits, the court has always either granted a mandamus in such cases, or directed an issue to be tried, in order that the party may have an opportunity to assert his right. Nothing more is necessary for the party applying for the writ, than to shew a probable cause; and this by no means concludes the question, but merely puts the right in a way to be tried. In the case of The King and the dean and chapter of St. Paul's, Wallace opposed an application which was made for a mandamus to admit one Arnold to the office of verger of the church, on the ground that the right on which he claimed was disputed; but the Court granted the writ in order to try the

right.

Lord MANSFIELD, Ch. J.

Nothing is so clear as that no person can use the pulpit of a rector unless he consent; or, in other words, no man can be a lecturer without such consent. But if there has been an immemorial usage, the law supposes that there was a good foundation for it. If the lectureship be endowed, that affords a strong argument to support the custom, and to shew that it had a legal commencement.

When an application is made for a mandamus, and the question turns upon a custom which the parties litigating desire to Vol. I. \*\* \*\* have

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have tried, the Court will grant the writ for that purpose, ex they will direct an issue to be tried. But, in such cases, a The King foundation must be laid before them, and they must see that there is some ground for the application. It will not be grantof Londow. ed merely for asking. In the present case there is not a colour for it; the lectureship is not endowed, it depends upon a voluntary contribution. All the evidence tends to prove that the consent of the rector has always been obtained. only entry produced is in 1708; and, even in that instance, it appears from the bishop's books, that the rector had given his previous consent to the candidate's standing for the leetureship. And no instance has been produced, in which & license has been granted without the rector's consent.

There cannot be a stronger a case. is no contradictory evidence, and therefore there is nothing for a jury to try. For the parties applying have not swort to any one instance in which a lecturer has been licensed

without the consent of the rector.

Rule discharged.

Friday. Fune 30th.

# GUNDRY against FELTHAM.

A person may justify trespass in foliowing a fox with hounds over the grounds he do no more than is (a).

RESPASS for breaking and entering the plaintiff's closes, with horses, dogs, &c. and for beating and hunting for game therein, and for breaking down, trampling down, and destroying the hedges of the plaintiff.

Pleas. 1st, The general issue, on which issue was taken. 2dly, And for a further plea in this behalf, as to the breaking of another, it and entering the said closes of the said plaintiff, in the said declaration mentioned, at one of the said several days and necessary to times when, &c. in the said declaration mentioned, and with kill the fox feet in walking, and with the said horses in the said declaration mentioned, and with the said hounds, greyhounds, and other dogs, in the said declaration mentioned, treading down, consuming, and spoiling a little of the grass then and and there growing and being; and as to the breaking down, trampling down, treading down, prostrating, and destroying, a little of the hedges and fences in the said declaration mention ed, there then standing, growing, and being, in and upon the

(a) Nicholas v. Badger, 37 & 38 Eliz. C. B S. P. post. 3 vol. 259. n. a.

closes in the said declaration mentioned by the said defendant above supposed to have been done, he the said defendant by leave of the court, &c. says, that he the said plaintiff ought not Gunday to have or maintain his aforesaid action thereof against him Faltham. the said defendant, because he says that before and at the said several days and times when, &c. the said hounds, greyhounds, and dogs, in the said declaration mentioned, were the hounds, greyhounds, and dogs, of one Humplery Sturt, Esq. and that the said Humphry Sturt was then a person qualified by the laws and statutes or this realm to keep and use the said hounds, greyhounds, and dogs, in the said declaration mentioned. And that the said H. Sturt, before the said several days and times when, &c. to wit, on the first day of September 1785 aforcsaid, at the parish aforesaid, in the said county of Dorset, had retained and employed the said defendant as his huntsman and servant, to hunt and take care of the said hounds, greyhounds, and dogs, in the said declaration mentioned; and that the said defendant, from that time until and at the said several days and times when, &c. had remained and continued, and then was such huntsman and servant of the said H. Sturt as aforesaid; and that just before each of the said several days and times when, &c. he the said defendant had started and found one of those destructive and hurtful vermin and beasts of prey naturally inclined to do mischief, called foxes, in and upon certain lands near to the said closes in which, &c., to wit, at the parish aforesaid in the said county of Dorset; and that he the said defendant, being such huntsman and servant of the said H. Sturt as aforesaid, a little before each of the said days and times when, &c. by the leave and license of the said H. Sturt, in order to hunt, pursue, take, kill, and destroy, the several respective foxes so started and found as aforesaid, and to hinder and prevent the said foxes from doing any mischief in the seighbourhood, had caused the said hounds, greyhounds, and other dogs, in the said declaration mentioned, being the hounds, greyhounds, and dogs, of the said H. Sturt, to hunt, follow, and pursue the said foxes; and that because each respective fox of the said foxes so respectively started and found as aforesaid, a little before each and every one of the said several respective days and times when, &c. had, during the said pursuits, Aed and run out of and from he said lands where they had been so as aforesaid respectively started and found, into and over the said cloves in which, &c. in the said declaration

1786. GU DRY agamet FELTHAN.

tion mentioned, he the said defendant, being such huntsman and servant of the said H. Sturt as aforesaid, did, at the said days and times when, &c. in the pursuit of, and to hunt, take kill, and destroy, the said several and respective foxes, and as the only way and mean for so doing, with one of the said horses in the said declaration mentioned, at each time when, &c. and with the said hounds, greyhounds, and other dogs, in the said declaration mentioned, follow and go after the said respective foxes into the said closes in which, &c. with an intent to kill and destroy the same, and did take, kill, and destroy the same; and in so doing, he the said defendant, at the said days and times when, &c. did break and enter the said closes of the said plaintiff in the said declaration mentioned, and with his feet in walking, and with the said horses in the said declaration mentioned, and with the said hounds, greyhounds, and other dogs, in the said declaration mentioned, did tread down, consume, and spoil a little of the grass then and there growing and being, and did a little break down, trample down, prostrate, and destroy the said hedges and fences in the said declaration mentioned, then and there standing, growing, and being in and upon the said closes in the said declaration mentioned, as he lawfully might for the cause aforesaid, doing as little damage to the said plaintiff as he the said defendant possibly could; which are the said several trespasses in the introduction to this plea mentioned, and whereof the said plaintiff hath above complained against him the said defendant; and this he the said defendant is ready to verify; wherefore he prays judgment, &c.

To this there was a general demurrer, and joinder in de-

murrer.

Lawrence for the plaintiff. The question upon this record is, whether a person hunting has a right to follow foxes upon the ground of another? The qualification of the person is entirely out of the question. By the general law, no person can go over the land of another without his permission; and in Sutton against Moody (a), Lord Holt said, " If A. start a "hare in the ground of B. and hunt it into the ground of G. " and kill it there, the property is in A. the hunter; but A. in # liable to an action of trespass for hunting in the grounds as well " of B. as of C." But the distinction which may be attempted to be taken between that case and the present is, that a fox is a nexious animal, and therefore that every person is at liberty

(a) 1 Lord Raym. 250.

to pursue and kill it wherever it is found. If it is so determined, it must be upon the principle, that it is for the public good to destroy the animal, and that the convenience and rights of individuals must give way: but this will equally give a GRADIAN. right to destroy fences, to go into standing corn, or gardens and nurseries, let the mischief to the owner be ever so considerable. The principle applies as well to searching for those animals in the grounds of another, as to the pursuit of them: but such a right is denied by every law-book on the subject.

1786. GUNDAY

In the case of Gedge v. Minne (a), it was determined that the defendant could not justify digging for a badger. And though Croke, J. said in that case, that, upon a pursuit, the defendant might follow and kill noxious animals over the grounds of a third person, without being subject to an action of trespass, yet that did not form a part of the case, and was merely founded on a dictum of Brooke, J. in 12 Hen. 8. 10. where he said, a man might justify entering into the lands of another to kill a fox, gray, or an otter, because they are beasts injurious to the commonwealth. But the principal question there grose concerning the property of a stag, which had been killed in hunting. And upon this have all the subsequent decisions been made, without regarding the occasion which gave rise to it. So that this dictum in Bulstrode was merely founded on a dictum.

But in 2 Rol. Abr. 558, there is an express authority against such a doctrine; for it is there said, "that the defendant could "not justify the trespass on account of hunting a fox;" and in the same case, as reported in Brownl. 224. Fenner, J. held, "that it was not lawful to break hedges in the pursuit." And breaking hedges in the present case constitutes a part of the trespass, which is confessed by this plea. thorities are recognized in Com. Dig. title, Pleader, 3 M. 37. where it is said, the defendant cannot justify either entering or digging for a fox.

Gibbs, for the defendant, was stopped by the Court.

Lord MANSFIELD, Ch. J. By all the cases as far back as in the reign of Henry 8th, it is settled that a man may follow a fox into the grounds of another. It is not necessary in this case to enter into the exceptions which have been made to that general rule, because this demurrer disputes the general proposition.

WILLES, J. said, that the case in Popham 162 was much

stronger than the present.

Buller,

(a) 2 Bulstr. 60.

1786. GUNDRY against FELTHAM.

The question on this record is, whether the BULLER, I. defendant be justified in following the fox at all over another The demurrer admits that which is averred man's grounds. in the plea, 'namely, that this was the only means of killing the fox. This case does not determine that a person may unnecessarily trainple down another person's hedges, or maliciously ride over his grounds: if he do more than is absolutely necessary, he cannot justify it; and such circumstances are a proper subject for a new assignment.

Judgment for the defendant.

Friday, June 30th.

Lord BUTE against GRINDALL and Another.

The ranger of a royal able, as sucb, to the poor park, yielding certain not for the pannage, which yield

HESE were two issues: The first of which was to try, whether the plaintiff, as park is rate- ranger and keeper of his majesty's park, called The New Park, near Richmond, in the county of Surry, was liable to be rated for inclosed to the relief of the poor of the parish of Putney, in respect of lands, in the 199a. Or. 12p. of inclosed lands, being meadow and arable, part of the said park, and 39a. 1r. 32p. of land, open to park pasture,

profits; but also part of the said park. The 2d, Whether the plaintiff was liable to be rated. &c.

berbage and in respect of the herbage and pannage of the said park? This cause was tried at the last assizes for the county of

no profits(a), Surry, before Gould, J. when the jury found a

Special verdict; which stated, That our Lord the now king, by letters patent under the Great Seal of Great Britain, bearing date at Westminster the 25th day of June, in the twenty. first year of his reign, reciting (amongst other things) that the princess Amelia, daughter to his late majesty king George the Second, had held, and had lately surrendered, resigned, and yielded up, into our said lord the now king's hands the office hereinafter mentioned, gave and granted to the said earl the office of ranger and keeper, and the custody of all that his said park, called New Park, near Richmond, in the countr of Surry, and the custody, survey, and preservation of all and singular the houses, lodges, edifices, walks, deer, wild beasts, and game, in his said park, there being, or thereafter to be. to have, enjoy, exercise, and occupy the said office, unto him the said earl, by himself, or his sufficient deputy or deputies, during his pleasure. And further, for the better execution of the

the said office, his said majesty had given and granted, and by the said letters patent did give and grant, unto the said earl the herbage and pannage of the said park, over and above the Lord Burk keeping of the game within the said park, from time to time against being; and also the fees of three bucks and three does every season: and also the wages and fee of six shillings by the day for every day in the year, payable as in the said letters patent is particularly specified; and also all woods and underwoods, commonly called browse wood, wind-full wood, and dead and decayed trees, mast and chiminage happening or falling from time to time within the said park, together with the necessary timber for repairing the houses, lodges, edifices, and walks, in the said park, and such timber as should be wanting and. necessary for dividing, separating, and enclosing any parts or parcels of lands within the said park, as should from time to time be judged convenient for improving the pasture and herbage thereof, and for beautifying the said park, as was therein before mentioned to be granted, so as such timber so to be cut down at any time should be made use of and employed within his said park for the purpose aforesaid, and not elsewhere or otherwise, unto the said earl during his said majesty's pleasure, together with the liberty of planting trees mainst the wall of the said park; and all other wages, fees, profits, rights, perquisites, commodities, advantages, and emoluments to the said office belonging or appertaining as of right had, taken, received, or usually enjoyed, with the like office, in as large, ample, and beneficial manner and form to all intents and purposes, as the said princess Amelia, or any other person or persons whoseever theretofore holding, enjoying, or exercising the said office and premises, or any of them, had and received, or ought to have had and received, by reacon thereof, without rendering, paying, or making any account, or any other thing for the same, to his said majesty, his heirs, or successors, in any manner whatsoever. That 269 acres of thereabouts of the said park are, and before the said earl hetame ranger, were and from thence hitherto have been, situare in the parish of Putney, in the county of Surry. That 290 acres or thereabouts, parcel of the said 269 acres, during all the time aforesaid, have been and still are inclosed lands, called the Caddocks, and 39 acres, residue thereof, during all the time aforesaid, have been and still are open to park pasture. That 106 acres of the said 230 acres of raclosed lands, during

against GRINDALL.

ring all the time aforesaid, have been and still are mendow. and the remaining 124 acres, during all the time aforesaid, have Lord Buts been and still are arable land, and have been and still are ploughed, and sown with corn and with rye grass and clover, in the ordinary course of husbandry. That the meadow, during all the times aforesaid, has been mowed, and the hay thereon made at seasonable times of the year by mowers and huy-makers hired as common labourers, and paid by the king. king has found the hayseed. That 66 loads of the hay when made has been yearly carried out of the inclosed lands into the park by servants paid by the king, in the king's waggons, drawn by the king's horses. That it has been there stacked in convenient places for the use of the deer, and the overplus of the said hay has been stacked up in a place in one of the inclosed paddocks, called the rick-yard, for the use of the king's horses, and the ranger's horses. That sometimes there has been no overplus. That last year there was not enough for the deer; but that the average quantity of hay made in the said inclosed meadow land, one year with another, has been one load on an acre. That the number of the king's horses has not been limited. That they have usually eat about 30 loads in a year: but they might have eat it all, if there had been That 40 or 50 head of cattle have come enough of them. into the said inclosed meadow lands in November in every year, and have stayed there till April or May following. That are to the arable land, when it has been sown with corn, the renger has found the corn seed; and when it has been sown with rye grass or clover, the king has found the seed. That it has been manured, ploughed, and sown, by the king's servants and horses. That the manure has come from the king's stables, and has been carried out on the land by the king's teams at the king's expence. That the corn has been reaped by labourers paid by the ranger, and has been carried by the king's servants and teams to a granury near the ranger's lodge, which is about half a mile from the inclosed paddocks, there being no barn on the said inclosed paddocks. That it has been carried from thence to the market, and there sold for the benefit of the ranger. That the king has had no part. That the straw coming from the said corn has been used for thatching the hay ricks, and for the king's cart horses, which have usually been about 14 or 15 in number; but they have been chiefly littered with fern. That when the arable land has been sown with clover

clover or tye grass, the king's and the ranger's horses have eat the hay made thereof, and the overplus, if any, has been laid up for the like use in future, but has never been sold. Lord Burn That in the month of November five or six brace of deer have against Gainbale been yearly turned into the paddocks amongst the corn, to be fatted for the king's birth-day. That they have eaten the green corn; and the corn has been likewise hurt by the keepex's riding up and down amongst it to search for the deer which have hid themselves in it, notwithstanding which there has been sometimes a pretty good crop. That three or four score of sheep belonging to the ranger have been turned into the arable lands about the autumn invevery year. That the profits arising to the ranger from the whole of the said lands are worth 100l. a year. That as to the 39 acres open to park pasture, the ranger has not received any profit at all from them. That the herbage and pannage of the said park have yielded no profit to the ranger. And that no swine have been fed in the said park. But whether, on the whole matter, the said earl is liable to be rated to the relief of the poor of the said parish of Putney, in respect of the said lands in the said rate or assessment, in the said first count of the said declaration mentioned, or any part thereof, or not, or whether the said earl is liable to be rated, &c. in respect of the herbage and pannage of the said park, or not, the jurors aforesaid are wholly ignorant, and pray the advice of the Court here thereupon, &c.

Russel for the plaintiff observed, that there were two ques-

tions for the consideration of the Court.

1st, Whether the plaintiff, as ranger of Richmond park, be liable to be rated for that part of the park which is inclosed? and,

As to the first: he must be rated either as being the occupier, or in respect of the perception of certain profits arising
from the land. But the ranger is clearly not the occupier:
the king has not demised to him the use of the park; he has
only appointed him his servant. The king has the dominion
and superintendance over the park; it is cultivated by the
king's servants, and the produce of it applied, in the first instance, to the feeding of the king's deer and horses. The
plaintiff therefore is merely a servant, and may be dismissed
from his office without notice or ejectment; and is not entitled to any emblements, as a tenant at will is. Neither is

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against

1786. he rateable for the profits, because these being the profits atrruing from the land, the occupier of the land only is rateable Lord But E for them. But the king is occupier, and would be rated for the land if he were a subject. Rating the salaries of the GEINDALL king's servants would be rating the King through the medium of his servants; for in order to give them a certain salary, he must raise their salaries in proportion to the deductions. The king, by this mode, pays his ranger by a preportion of the profits; and if a private gentleman were topay his bailiff by a certain proportion of the profits of the hand, there could be no pretence for rating such bailiff, because it would be rating his salary. And those profits being perquisites of office, are in the nature of wages or salary. In Sherrington's case (a), a salary was held not rateable. There is likewise another objection against rating the ranger in respect of the profits, because they are uncertain, since the king may turn in as many deer and horses as he chooses; there is therefore no visible ability of being rated.

BULLER, J. He is rated for the amount of the profits at

the time of making the rate.

Russel. Nothing should be rated in the hands of the king's ranger, which would not be rated in his hands if he were ranger to any other person. And in this case the plaintiff has not even the possession of the soil. He admitted that when lands belonging to the king are demised to a subject for any permanent interest, they are liable to be assessed (b), because he is the occupier: but sufficient appears on this special verdict to warrant the Court in saying, that this park is in the accupation of the king, since the corn is subject to the use of the king's deer. And this is not like the case of The King against Matthews (c), where the keeper was held to be rateable for the keeper's lodge and two acres of land in Windser park; because there the defendant was actually the occupier.

The Court were clearly of opinion on the 2d point, without hearing any argument, that the plaintiff was not rateable

for the herbage and pannage.

Shepherd for the defendant was stopped by the Court.

Lord MANSFIELD, Ch. J. The question on this verdict is, whether the plaintiff is rateable at all?—not for how much. or in what proportion.

It

<sup>(</sup>a) 4 Burr. 2011.

<sup>(</sup>b) Duke of Portland against the parish of St. Margaret, Westminster, Cald: 153.

<sup>(</sup>c) Cald. 1.

It is clear that he is not rateable for the herbage and panmage, because they yield no profits. But there is a parcel of
land inclosed, which he sows, and for which he afterwards Lord Butz
means the corn to the amount of 100% a year; therefore he is
cocupier; and quo nomine occupier can make no difference;
whether by gift or for wages. This is like the case of The
King against Matthews, where it was held that a servant occupying the lodge and two acres of land, whether he paid for
them by a rent or by service, was equally liable.

BULLER, J. It is perfectly immaterial what interest the eccupier has in the lands; whether he holds as tenant at will, or by any other tenure: It is not necessary to enquire into the

occupier's title.

Per Curian. On the first count judgment for the defendant; and on the 2d count judgment for the plaintiff.

## De HAHN against HARTLEY (a).

Friday, June 30th.

HIS was an action upon promises brought by the plain-Whatever is tiff (an under-writer) to recover back the amount of a written in the margin of a policy of insurance.

Plea the general issue.

The cause was tried before Buller J. at the Sittings after last is a warran-Easter term at Guildhall, when the jury found a special verbe literally
dict; which stated,

a written in the margin of a policy of insurance it is a warranty, and must be literally complied

That the defendant on the 14th June 1779, at London, with. gave to one Alexander Anderson, then being an insurance broker, certain instructions in writing to cause an insurance to be made on a certain ship or vessel called the Juno, which were in the words and figures following; Please get 2000l. "insured on goods as interest may appear; slaves valued at 30l per head; comwood 40l. per ton; ivory 20l. per hundered weight; gum copal 5l. per pound; at and from Africa to her discharging port or ports in the British West Indies; warkanted copper-sheathed, and sailed from Liverpool with 14 six-pounders, (exclusive of swivels.) &c. 50 hands or up-mards, at 12, not exceeding 15 guineas. Juno—Beaver. S. Hartley and Company, June 14th, 1779."

That the said Alexander Anderson, in consequence of the said written instructions from the said defendant on the said

14th

<sup>(</sup>a) The judgment in this case was afterwards unanimously affirmed in the exchequer Chamber. post. 2 vol. 186.

HARTLEY,

1786. 44th June, 1779, at London aforesaid, &c. did cause a certain writing or policy of assurance to be made on the said ship or DE HALM vessel called the Julo in the words and figures following; (reciting the policy), which was upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, &c. of and in the ship Juno, at and from Africa to her port, or ports of discharge in the British West-Indies, at and after the rate of 151. per cent.

> The verdict, after reciting two-memoranda, which are not material, then proceeded to state, that in the margin of the said policy were written the words and figures following, " Sailed from Liverpool with 14 six-pounders, swivels, small

arms, and 50 hands or upwards; copper-sheathed."

That on the said 14th June, 1779, and not before, at London aforesaid, &c. the plaintiff under-wrote the said policy for the sum of 2001, and received a premium of 311, 10s. Od.

as the consideration thereof.

That the said ship or vessel called the Juno sailed from Liverpool aforesaid on the 13th October 1778, having then only 46 hands on board her, and arrived at Beaumaris, in the isle of Anglesea, in six hours after her sailing from Liverpool as aforesaid, with the pilot from Liverpool on board her, who did pilot her to Beaumaris on her said voyage; and that at Beaumaris aforesaid the said ship or vessel took in six hands more, and then had, and during the said voyage until the capture thereof herein after mentioned, continued to have, 52 hands on board her.

That the said ship or vessel in the said voyage from Liverpool aforesaid to Beaumaris aforesaid, until and when she took in the said six additional hands, was equally safe as if she had had 50 hands on board her for that part of the said voyage.

That divers goods, wares, and merchandizes, of the said defendant of great value, were laden and put on board the said ship or vessel, and remained on board her until and at the time of the capture thereof herein after mentioned. that on the 14th March 1779, the said ship or vessel, while she remained on the coast of Africa, and before her sailing for her port of discharge in the British West-India Islands. was, upon the high seas, with the said goods, wares, and merchandizes on board her as aforesaid, met with by certain enemies of our lord the now king, and captured by them. &c. and thereby all the said goods, wares and merchandizes

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of the said defendant, so laden on board her as aforesaid,

were wholly lost to him.

That when the said plaintiff received an account of the Dr. HAHR said loss of the said ship or vessel, he paid to the said defenHARTLEY.
dant the said sum of 200L so insured by him as aforesaid, not having then had any notice that the said ship or vessel had

only 46 hands on board her when she sailed from Liverpool as aforesaid. But whether upon the whole matter, &c. Law, for the plaintiff, was stopped by the Court.

Wood, for the defendant, Admitted, that a marginal note in a policy of insurance may be a warranty; but contended that this was distinguishable from the case of Bean v. Stupart (a), and all the other cases on the subject. In the cases decided, it has always been a warranty of a fact relating to the voyage insured: but in the present case, that which is written in the margin has no relation whatever to the voyage, for it relates merely to the force of the ship at Liverpool, before the voyage commenced, and is totally unconnected with the risk insured. The insurance is, "at and from Africa to her port of discharge in the Bri-"tish West-Indies;" and the warranty is from Liverpool; which is antecedent to the voyage insured, and is merely a representation of the state of the ship when she set out on her voyage from Liverpool. Then if it be only a representation, it is immaterial whether complied with or not, because it is found by the verdict that the ship was equally safe with the number of hands she had on board, as if she had had the whole number contained in the warranty. The warranty then can only relate to her being copper-sheathed: that part indeed was extremely material, because otherwise the risk would have been considerably encreased; and that extended to the voyage insured: but the other part of the marginal note was merely a representation, because the manner of sailing from Liverpool was unconnected with the risk insured.

But even if the court should consider the whole as a war-

ranty, it has been substantially complied with.

Lord MANSFIELD, Ch. J. There is a material distinction between a warranty and a representation. A representation may be equitably and substantially answered; but a warranty must be strictly complied with. Supposing a warranty to sail on the 1st of August, and the ship did not sail till the 2d, the warranty would not be complied with. A warranty in a policy

(a) Doug. 11.

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**e**gainst MARTLEY.

policy of insurance is a condition or a contingency, and unless that be performed, there is no contract. It is perfectly im-DE HAHN material for what purpose a warranty is introduced; but being inserted, the contract does not exist unless it be literally complied with. Now in the present case, the condition was the sailing of the ship with a certain number of men; which not being complied with, the policy is void.

ASHHURST, J. The very meaning of a warranty is to preclude all questions whether it has been substantially complied

with; it must be literally so.

BULLER, I. It is impossible to divide the words written in the margin in the manner which has been attempted; that that part of it which relates to the copper-sheathing should be a warranty, and not the remaining part. But the whole forms one entire contract, and must be complied with throughout Judgment for the plaintiff.

Friday, June 30th.

### HORTON against WHITTAKER.

HIS was a case sent from the court of chancery for the Where the opinion of this court. devisor had three sisters. 13th July 1749. Edward Busby, by his will of this date. (one of signed by him in the presence of, and attested by three witwhom was nesses, after devising his real estates to his issue, if he had sny, married,) and devised in case he should die without issue of his body, he gave and land to trus-devised the same as follows, viz. As to the moiety of the tees and estates in Sedgley, Dudley and Rowley, in the counties of their heirs, 44 In trust Stufford and Worcester, he gave and devised the same unto his that they wife, her heirs and assigns. And being next desirous to proand their heirs should vide for his sisters, but considering that his sister Mary Sawrey, wife of William Suwrey, was already well provided for during the life of the during the life of her said husband, and therefore would not, married sis- unless the huppened to survive him, want any assistance to enable ter, receive her to live in the world, he gave and devised all his real the rents and profits, estates in the city of Oxford, Claufield, and Ascott, and add and pay the other his estates in the county of Oxford, unto Samuel Salt, same to the two other sisters, their

heirs and assigns, and from and after the decease of the husband, in case the married sister should be then living, to the use of the three sisters severally in thirds for life, with several remainders to their first and other sons, in tail, remainder to the daughters as tenants in common, with cross remainders between the sisters on default of issue of their bodies respectively, remainder over in tail:" The condition of the married sister's surviving her husband is not annexed to any of the limitations subsequent to the limitation of the life estate. And the remainder-man in tail can alone make a good tenant to the practipe upon the death of the three

sisters without issue, notwithstanding the husband be then living.

Esq. and Lancelot Shadwell the elder, chemist, their heirs and assigns, in trust, that they and their heirs, during the life of the said Mary Sawrey, should receive the rents and profits of Honrow the said estates, and pay the same to the testator's sisters Eliza- WHITTAbeth Busby and Martha Busby, their heirs and assigns; and from and after the decease of the said William Sawrey, in case the testator's sister Mary should be then living, then in trust as to one third part of the said last mentioned estate to the use of the said Mary Sawrey and her assigns, for and during her life; and as to one other third part of the same estate, to the use of the said Elizabeth Busby and her assigns, for and during her life; and as to the remaining third part thereof, to the use of his said sister Martha Busby and her assigns, for and during her life; and after the death of any or either of his said sisters, then as for and concerning the third or share of her so first dying, to the use of the first and every other sons of her so first dying, severally and successively, and the heirs of the bodies of such first sons, and in default of such issue, to the use of all and every the daughter and daughters, as temants in common: but in case such sister, first dying, should leave no issue, then in trust as to the third or share of her so first dying, to the use of the survivors of them (meaning his said sisters), in equal shares and proportions for and during their lives: and from and after the death of either of the survivors, then as to the part or share of her so second dving, to the use of the first and every other son of her so second dying. severally and successively, and the heirs of the bodies of such sons; and in default of such issue, to the use of all and every her daughter and daughters as tenants in common; and in default of such issue, then in trust as to the part or share of her so second dying, to the use of the remaining and surviving sister, for and during her life; and from and immediately after the death of such surviving sister, then his said trustees should stand seised of the estate of her so last dying, to the use of the first and every other son of her so last dying, severally and successively, and the heirs of the body of such first sons; and in default of such issue, to the use of all and every her daughter and daughters as tenants in common; and in default of such issue, then to the use of John Shadwell Horton (therein called John Lancelot Horton) eldest son of Mr. Youn Horton, sugar-baker, and the heirs of his body; and in default

HORTON against WHITTA-

default of such issue, to the use of Thomas Horton, second so of the said John Horton, and the heirs of his body; and in default of such issue, to the use of all and every other son and sons of the said John Horton, to be begotten severally and successively, and the heirs of the bodies of such sons; and in default of all such issue, to the use of Thomas Webb, son of Ann Webb, and his heirs. And as to all that his the teststor's real estate at Barton Under Needwood, in the county of Stafford, and all other his real estate and estates whatsoever, not therein before devised, which, by settlement upon his marriage, was or were settled upon his said wife for life, and to such other uses and trusts as therein mentioned, in case he should die without issue, he did thereby give and devise the said last mentioned estate, after the death of his said wife, and all his right and interest therein, unto the said Samuel Salt and Lancelet Shadwell, their heirs and assigns, in trust never. theless to the like uses, intents, and purposes, and subject to the like limitations as were mentioned and expressed concerns ing his estate in Oxfordshire therein before devised to them: and appointed Theodosia his wife executrix of his will. testator afterwards died without issue, leaving his said sisters Mary, the wife of the said William Sawrey, Elizabeth Busby, and Martha Busby, his co-heirs at law. And,

On the 31st May 1751, the said Theodosia, the devisor's wife, proved his said will in the prerogative court of Can-

terbury.

In 1770, the said *Theodosia*, the devisor's widow, died. The devisor's sister *Mary*, the wife of the said *William Sawrey*, died without issue, in the life-time of her husband.

Afterwards, in 1781, the devisor's sister, Elizabeth Busby;

died without issue, intestate.

And, 2d April 1782, Martha Busby, his only surviving sister, by her will of this date attested by two witnesses only, after giving several specific and pecuniary legacies, gave all the residue of her personal estate and effects whatsoever, and of what nature, kind, or sort soever, not therein before otherwise disposed of, after payment of her debts, legacies; and funeral expences, and all her right and interest therein or thereto, unto her brother-in law the said William Sawrey, and nominated and appointed the said William Sawrey sole executor of her said will. The said Martha Busby, the testatring apon after died without issue.

From

From the death of the said Theodosia the rents of the Staffordshire estate were paid to the said Elizabeth and Martha, during the life of Elizabeth, and afterwards to the said Murtha Busby.

HORTON against WHITTA

By indenture of bargain and sale, dated 6th November 1782, inrolled in the court of Common Pleas, and made between the said S. Salt (who had then survived the said L. Shadwell, his co-trustee) of the first part, the said J. S. Horton of the second part, J. Harwood of the third part, and J. Ward of the fourth part, after reciting the will of the said E. Busby, and the deaths of the said E. Busby and his sisters, Mary, Elizabeth, and Martha, without issue, and that the said J. S. Horton was, by virtue of the will of the said E. Busby, become immediate tenant in tail of all the manor, &c. being all the real estates which by the said will were devised to the said S. Salt and L. Shudwell upon the trusts, and to the uses, therein mentioned, it was witnessed that, for barring all estates tail, and remainders and reversions thereupon expectant, of and in the manor, &c. and in consideration of the sum of five shillings paid to each of them the said S. Salt and J. S. Horton, he the said S. Salt did bargain and sell, and the said J. S. Horton did bargain, sell, and confirm unto the said J. Harwood all, &c. unto, and to the use of the said J. Harwood and his heirs, to make him tenant to the præcipe for suffering common recoveries thereof, wherein the said J. Ward should be demandant, the said J. Harwood tenant, and the said J. S. Horton vouchee. And it was thereby declared that the said common recoveries should be and enure to the use of the said J. S. Horton and his heirs.

In Michaelmas Term, 23d Geo. 3. common recoveries were

accordingly suffered, &c.

, Graham for the plaintiff made two questions ;

1st, Whether the limitation to J. Shadwell Horton, in the event which had taken place, was good?

2dly, Whether it was good to such an extent as to effec-

tuate the recovery suffered by him in 1782?

With respect to the first. The whole doubt of the case arises from the circumstance of Mary Sawrey's dying in the life-time of her husband, against which event the testator had not provided.

The Court is to consider whether the condition (if it can be so called) of Mary Sawrey's surviving William Sawrey was merely confined to the life-estate, or was to extend to all

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HORTON against WHIITA

the subsequent limitations. From the situation of the devisor's family at the time of making his will, it is manifest that he only meant to annex it to the life-estate. After providing for his own issue, his next care was to make a provision for his two unmarried sisters; but he did not intend that his married sister should derive any advantage under his will during her husband's life, because she was already sufficiently provided for. This is improperly called a condition. If there were any doubts on the construction of the will, they are entirely removed by the cases which have been determined on the subject.

That of Napper v. Sanders (a) was much stronger than the

present; for the same question there arose on a deed.

He then cited Jones v. Westcomb, 1 Eg. Cas. Abr. 245. Pret. in Chan. 316. Statham v. Bell, Cowp. 40. Dougl. 66. n. 4. Roe dem. Hammerton v. Mitton and Another, 2 Wils. 356. Avelyn v. Ward, 1 Vez. 420. Andrews v. Fulham, 2 Strat. 1092. Bradford v. Foley and Others, Dougl. 63. Gulliver and Wickett, 1 Wils. 103. The devisor had good reasons for annexing the condition to the life-estate; for his general intent was, that Mary Sawrey should take nothing unless she survived her husband; but after her death the devisor could have no reason for continuing this condition, for he intended that all the limitations should take effect.

2dly. If it be objected that the two unmarried sisters rook the legal estate to them and their heirs during the life of Willam Sawrey; that the devise to Horton is not to take effect till after the decease of William Sawrey; that therefore no estate is now vested in Horton, and that consequently there was no good tenant to the pracipe; the answer is that it was intended that the trustees should receive the rents and profits of the estates during the life of William Sawrey, but it is not expressed how long they are to pay them over to the other sis-The trust-estate was only raised for the purpose of teceiving the rents and profits for the benefit of the two sisters and their beirs, during the life of William Sawrey; therefore on the death of the survivor of them without issue, the trust estate ceased, the trustees having been only seized pour autie vie. The limitation to Horton was intended to take effect immediately after the death of the surviving sister without issue: on the happening of which event, the legal estate descended to him, and therefore there was a good tenant to the pracipe.

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1786.

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Wilson, contra. According to the grammatical construction of the devisor's will, the condition, or conditional limitation, armexed to the life-estate, is likewise annexed to all the subsequent limitations. If so, the Court will not put a different construction on it, unless they are warranted by the apparent intention of the devisor. The Court can only judge of the devisor's intent from the will itself. This is like the slip which was made in the case of Doe dem. Gregory v. Gilpin in this Court, where the devisor gave his estate to his natural son in case of the marriage or death of his widow, who was obliged to marry in order to give it to the son during her life. It is extremely clear that the devisor intended to annex this condition to all the subsequent limitations: for if it be confined to the life-estate, this absurdity would follow; that William Surprey might also survive the two other sisters, and the trustees, would still receive the rents and profits of the estates, notwithstanding the death of the three sisters without issue. But if Mary Sawrey survived her husband, then one of the sisters must be living when the estate pour auter vie determi-So that there would be no contradiction, if all the subsequent limitations depended on that contingency.

He asimitted that this came within the principle of the cases cited, if the court should be of opinion that this condition was only annexed to the life-estate: but he contended that in order to render the will consistent, it was necessary to consider the condition as annexed to all the subsequent limitations.

2dly. There is a legal estate given to the two sisters, their heirs and assigns, for the life of W. Sawrey. The trustees have no other power but that of receiving the rents and profits, &c. which is merely a declaration of the trust. When trustees are to do nothing but for the benefit of the cestui que trust, the struste gives the land to him. There are only two instances where the trust continues executory; 1st, where an we is limited upon an use: but here there is no limitation of uses: and 2dly, where something is to be done by the trustees, as to pay debts, &c. which makes it necessary for them to have the lagal estate: but in the present case, the trustees are merely to receive and pay the rents; and therefore the trust is executed.

In Shapland v. Smith (a), there was a devise to trustees and their heirs to pay the rents and profits (after deducting rates, taxes,

(a)Branes, 76. Vide Silvepter v. Wilsons, post. 2 vol. 446; Uc.

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Horton against Whitta. taxes, and repairs) to Shapland and his assigns for life, and after his decease to the use of the heirs male of the body of Shapland, and in default of such issue remainder over. question there was, whether the first was a trust or a legal estate; if the former they could not unite; if the latter, they might. There it was argued that there was something for the trustees to do, namely, to repair, &c. And the case of Jones v. Lord Say and Seal (a) was cited; where an use to a feme covert was held to be a trust. Lord Chancellor said, that an use must, prima facie, be taken to be executed; that where the whole profits go, the statute will carry the land after it. But the trustees being to pay the taxes and repairs must have an interest in the premises, therefore the legal estate for the life of Shapland was in them, and he had only an equitable estate for life; and the subsequent estate being executed, he had an equitable estate for life, and a legal remainder in tail, which could not unite; and of course, there could not be a good tenant to the pracipe.

If then, according to the doctrine of that case, this be an use executed, the recovery suffered by *Horton* is void. The parties under the will stood thus; there is a limitation to the two sisters and their heirs during the life of *Wm. Sawrey*; and after his decease there are several limitations over, with remainder to *Horton* in tail. That life-estate is yet existing in the heir of the surviving sister as special occupant under the statute of frauds, because *Wm. Sawrey* is still living. And there could be no good recovery, unless that heir was

made tenant to the pracipe.

No further mention was made of this case in court. And

on this day the Court (b) certified as follows:

"Having heard counsel in this case, and having perused and considered the will itself of Edward Busby, we are of point on that J. Shadwell Horton, under the limitations of the said will and the recovery suffered by him, took an estate in fee simple.

E. Willes, W. H. Ashhurst, -F, Buller."

The

<sup>(</sup>a) 1 Equ. Cas. Abr. 383.

<sup>(</sup>b) Lord Manafield was not in Court on the Wth of June, when the case was argued.

1786.

The KING against The Inhabitants of SOUTHOWRAM. Saturday,

THE pauper Elizabeth Booth widow, and her three chill An order dren, were removed by an and a first state of the state of dren, were removed by an order of two justices from unappealed the township of Southowram to the township of Northowram, from, removing a faboth in the West-Riding of the county of York. On appeal ther, is no to the Sessions, they stated that it appeared from the evidence proof of the of William Booth (the father of Jeremiah, the late husband of removal of a the pauper Elizabeth) that the said William, Jeremiah, and neither menalso the father and grandfather, of William Booth, were born tioned in. and settled at *Halifax*, where *Jeremiah Booth* was likewise nor removed born; but it did not appear that *Jeremiah* had done any act by, it. to gain a settlement. That on the 6th of *April* 1774, two justices for the West-Riding of Yorkshire made an order for removing the said William Booth and Elizabeth his wife (but not any of their children) from Halifax to Northowrum aforesaid, which order was duly served upon the then overseers of the poor of Northowram, who thereupon received the two paupers, and did not appeal against the order. That some years before, and at the time of, the said removal of William Booth and his wife, the said Jeremiah was married to Elizabeth one of the paupers, by whom he had the three other paupers, and from the time of his marriage until his death lived at Halifax in a dwelling-house, which he rented himself, separate and independent of his father, and was not removed by or mentioned in the said order, nor was then any part of his family. Whereupon the Court (of Sessions) discharged the order of the two justices, subject to the opinion of this Court, whether the settlement of the said Elizabeth Booth and her said three children was by inference to be deemed at Halifax, or to follow the settlement of the father to Northowram.

Bearcroft, Fearnley, and Lambe, shewed cause. It is clear that the settlement of Elizabeth Booth is in the Parish where her husband was settled at the time of his death, it not being stated that she has done any act since to gain a settlement elsewhere; now it appears that he was settled at Halifax. And though the case states that his father and mother were removed from Halifax to Northowram by an order which was unappealed from, yet at that time the son was emancipated from his father's family, and therefore his settlement did not

follow that of his father.

Wilson

1786. against SOUT HOW-RAM.

Wilson, Haywood, and Cockell, contra, observed that the case was imperfectly stated: for that sufficient appeared upon the The Kine face of it to shew that the justices did not mean to state that Ferem ah Booth was settled, but only that he was born, at Ha. lifus, and therefore the Court will send it down to be re-stated.

But even upon the case as it now stands, the Court must conclude that the settlement of the son followed that of the father, since it does not appear that the son ever did any act to gain a settlement in his own right. Every legitimate child derives a settlement from his father, and follows the father's settlement till he is emancipated and gains one in his own right: then it was incumbent on the other side to have shewn that he did gain a settlement in his own right, otherwise he must be taken to be settled at Northewram with his father. under the order of removal which was unappealed from. And they cited the case of The King and Warblington, apte 241.

Per Cur. The order of removal unappealed from is conclusive as to the father and mother, but not as to the son, because he is not mentioned in it. And the Sessions have ex-

pressly found that the son was settled at Holifax,

Original order quashed; and Orden of Sessions aftermed.

Saturday. July 1st.

The KING against The Inhabitants of NEWINGTON.

If a pauper quit the parish to which the granted without any intention of returning the certifiend. [See R v. Št. Michael's Coventry. post. 5 vol.

526.]

JOHN SMALL, Mary his wife, and their five children. were removed by an order of two justices, from the parish of Newington to the parish of Mersham, both in the county certificate is of Kent. The Sessions, on appeal, quashed that order, and stated the following case;

That the father of the pauper resided at Newington about four years under a certificate from Mersham, bearing date the 2d day of June, 1748, during which time the pauper was born. cate is at an That the father then moved with his whole family to the hundred of Hoo, distant about nine miles from Newington, and staid there for two years; and from thence also moved with his whole family to Strood distant eight miles from Newington, where he continued about four years, when he died there. That about two years after the father's death his mother went to Newington to keep her uncle's house, with whom she continued till his death; and that she afterwards lived at Newington till she herself died, and was relieved by Newington, The KING having, after her husband's death got a settlement there. That the pauper within a year after the father's death went to Newington, and there hired himself (being unmarried) as & servant to one Austen of the said parish of Newington for & year, and lived with the said Austen in the said parish of Newington the whole of the said year, under the said hiring, and, authe expiration of the said year, continued with the same master for another year, in the said parish of Newington, as a yearly servant; and at the expiration of his said service with the said Austen, the said pauper hired himself to one Mr. Saunders, minister of the said parish of Netwington for a year as a servant, and continued in his service two years in the said parish of Newington, in consequence of the said hiring; and never gained a settlement elsewhere. Minguy and Robinson in support of the order of Sessions.

1<del>78</del>6. aydinat NEWING-TÓN.

This case falls within the principle of the cases of The King and Taunton (a), and The King and Frampton (b), which shew that a certificate may be got rid of by desertion; and though It has never yet been determined what length of time will amount to an abanconment, yet as the curtificate is only att acknowledgment by the parish certifying that the pauper is settled in such parish, wherever it is clearly shewn that he quitted the parish to which the certificate was given without any intention of returning, it is at an end. The certificate, therefore, having been discharged by the father's removing with his family to Hoo, and from thence to Strood, without my intention of returning to Newington, the pauper might

gain a settlement there afterwards by hiring and service. Bearcroft and Hervey, contra, admitted that a certificate might be got rid of as well by desertion as by other methods. but contended that the circumstances in this case did not amount to a desertion. There is a great distinction between the cases cited and the present. In that of The King and Toursen, the certificate had been deserted by the grandfather of the pauper for 34 years. After such a length of time the Court presumed that there was a legal end of the certificate. The case of The King and Frampton also differs from this in

<sup>(</sup>a) Burr. Set. Cas. 402

<sup>(</sup>b) Dougl. 402. and Cald. 97.

1786. several particulars. There the pauper was not born in the parish to which the certificate was granted, and the pauper never The King went into the parish of Frampton till the father had abandoned the certificate; for when he left that place, he had no intention of returning; and even when he did return, it was upor special business, which circumstance was relied on by Lord Mansfield in giving judgment. It has been decided in many cases, that a pauper does not avoid a certificate, by leaving the parish to which he is certified for a short space of time; and in the case of The King and Keel (a) an absence of seven years, during which time the pauper was hired and served for a year in the parish granting the certificate, was held not to discharge the certificate. In determining these questions the Court has always had a regard to the intention with which the pauper left the certificated parish. Now in this case the parish considered him as returning under the faith of the certificate; for the case states that the pauper returned to the parish of Newington, and there hired himself: now the circumstance of the pauper's return was a distinct independent act from the subsequent hiring and service; therefore he must be considered as having returned under the certificate.

Lord MANSFIELD, Ch. J. It is a melancholy consideration that so many questions should daily arise on settlement The Court in their determination should, if possible, get at certainty; for it is of more consequence to the public that the rule should be certain, than what the rule is. It is admitted that there may exist a case, in which a certificate shall be considered as functus officio. Then the Court ought to draw a line; in doing which, it will be material to consider what is the nature of a certificate. It seems to me that a certificate by the parish from which the pauper goes to another is an indemnity to that other parish from the consequences of permitting him to reside there; therefore it has done its office the moment that residence is permanently at an end. porary absence for a particular purpose will not discharge it: but when the pauper has left the certificated parish for years, and neither party has had any reliance upon the certificate. then it has done its duty, and has no longer any operation, In the present case, the pauper had left the certificated parish for six years, without any intention of returning, by which it is manifest that the certificate was discharged.

WILLES

(e) Cald. 144.

WILLES, J. The true question is, whether the pauper came into the parish of Newington under the faith of the cer-The father had removed with his whole family to The King Hoo, and afterwards to another parish, where he died, without having returned to Newington. In some respects this is a stronger case than that of the King and Frampton; for in that case the father did return to the certificated parish; here he did not. Again, in that case the hiring and service of the son were in the life-time of the father; here the pauper was not hired in Newington till after the father's death; and at the time he so hired himself, the mother resided elsewhere, and all the parties seem to have considered the certificate as at an end. When there is a decided case to support us, minute circumstances should not induce us to make any alteration in the law. It is said that this case differs from that of Framp. ton, because the pauper was born in the parish; but, taking all the circumstances together, that makes no difference, for none of the family thought of the certificate; the father had left the parish, and was dead, and the mother was living elsewhere at the time that the pauper returned to Newington. And it is clear to me that he returned without any consideration about the certificate. This case is different from that of the King and Keel; there the pauper's brother remained in the certificated parish, and the pauper returned to his house under the faith of the original certificate, and not with a view to a hiring and service, as in the present case; for here the pauper came into the parish of Newington as a new man, the Certificate having been before abandoned.

ASHHURST, J. The rule now laid down is safe and proper,

ASHHURST, J. The rule now laid down is safe and proper, and is likely to be attended with fewer inconveniencies than any other. It is extremely desirable for the sake of the public that some certain rule should be established, which I think should be this; as the intention of a certificate is only to indemnify the parish to which it is given during the residence of the pauper, whenever he leaves the certificated parish without any intention of returning, the certificate should be taken to be at an end: any other rule would be attended with great inconvenience. No precise line can be drawn with respect to length of time: but where a pauper has once quitted the parish to which a certificate was granted, and returns to it again, it is competent to that parish to require a fresh in-

demnity.

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Buller.

1786. NEW NO-TON.

BULLER, J. Harall questions relative to settlements, it is desirable that some broad plain ground should be established; The King and in these cases one of two rules must hold; either that when a certificate is granted, the pauper shall never, during his whole life, gain a settlement in the certificated parish; or wat he shall discharge the certificate by quitting the parish to whiteh such certificate is granted. If this had been a new question, the first would have been the best rule, because it abcords more strictly with the letter of the act of parliament; and my idea is, that we cannot keep too close to the statute. But that rule cannot be adhered to without overturning a multiplicity of cases; for it has been decided in many instances, that a certificate may be abandoned. In the King and Taunton, the Court said that neither the father nor the grandfather could have gone back to the certificated parish without a new cert. tificate. If that went on any principle, it was this, that the grandfather of the pauper, by leaving the parish to which he was certificated, and going into another without any intenstion of returning, discharged the certificate. Some of the cases hold that, if a certificated person gain a settlement in a third parish, he may afterwards gain one in the parish to which he was certificated. The fact of the pauper's leaving the parish is known to the parish officers, but they cannot know what the pauper does after he has left the parish. Then it is just the same as to the parish receiving the certificated man, whether in the intermediate time he has done any act to get rid of the certificate or not; therefore, in all cases, whenever a pauper returns to the parish again, they should require from him a new certificate and a new indemnity. And I hope this case will put this part of the law at least out of dispute for the future.

Order of Sessions affirmed.

Saturday, July 1st.

The KING against The Inhabitants of OLD ALRES. FORD.

WO justices by an order removed John Dorey, his wife. Where the pauper rentand children, from the parish of Old Alresford, to the ed the fish parish of Chilton Candover, both in the county of Southamptons. "pond, with The sessions on appeal, quashed that order, and stated the " the spear-following case.

" sedge, " flags and

That

" rushes, " growing in and about the same, for 10/. a year," the Court understood that the soil passed with it, and that it was a tenement within the statute 9 and 10 W. 3. c. 11. The fact of the pauper's taking a tenement of 10/, a year is sufficient to give a settlement though the leasor has no title.

.350

against OLD AL-RESTOND.

That the pauper's father, and also the pauper himself, resided in Old Alresford under a certificate from Chilton Candoever, and that the pauper and his family before the order of The King removal became chargeable to Old Alresford parish. That after the pauper's father went into Old Alresford he rented a house and piece of land in Old Alresford at 31. a-year, and occupied the same several years. That during two years he took and held under a parel agreement from Mr. Edwards the following premises in Old Alresford, viz. the fishery of the soud, containing 60 acres called Alresford-pond, with the grates, &c. and also all the spear-sedge flugs, and rushes, growing in and about the said pond, and the right of cutting the sedge growing on a piece of rough meadow or seden ground, containing seven acres, not being part of the said mond; but being distinct therefrom, and held under a different right. That the pauper's father agreed to pay Mr. Edwards 101 a year for the said premises, and to supply Mr. Edwards's house with fish. That during the time the pauper's father sheld the said premises of Mr. Edwards, he rented and held sender a parol demise the fishery of the causeway river in New Alresford, with the grates to a small fish-house, and paid 31. an ear for the same. That the said house and piece of land first mentioned, and the right of cutting redge, &c. on the said reman mores of rough meadow ground and the said fishery. &c. last mentioned, were together of the annual value of 101. without taking the said pond or any thing thereto belonging into the ac-That the counsel for Oid Airesford, to shew that Mr. Edwards had no right to demine the fishery of the said pond, effered to prove, that in 1759 the then hishop of Winton, being seised in fee of the soil of the said pond, granted a pastent of the office of supervisor and governor thereof to George Bridges Rodney, Esq. (now Lord Rodney) and his son George That at the time Mr. Edwards made the agree-Rodney. &c. ment with the pauper's father, he held of the said George Bridges:Rodney and, George Rodney the premises granted by the patent, and had no other interest in the said pond. previous to such taking, viz, in 1764, the then bishop of Wenton, lord of the manor of Old Alresford, at a court haron held: for that manor, granted to the said; Lord Rodney, all the rushes, reeds, and flags, growing in Alresford pond for 21 years. That Mr. Edwards, at the time of the said agreement with the papper's father, held of the said Sir George Rodney whatever was granted as last aforesaid; but the Court were οf

1786. of opinion such evidence was inadmissible, and refused to

The King against OLU AL-

Bearcroft and Portal were to have argued in support of the order of sessions, but the Court desired to hear the other side.

Wilson, Lowrence, and Burrough, against the order, contended, that this being the case of a certificate man, it was incumbent on the other side, according to the doctrine laid down in the case of the King and Warblington (a), to shew that the certificate was discharged; in order to do which, they proved that the pauper took the fishery of Alresford pond. fishery being an equivocal phrase, does not ex vi termini mean a several fishery: From the statement of the case it does not sufficiently appear what kind of fishery the pauper took; whether it was a several or free fishery, or only a common of piscary: therefore, as the appellants proved generally that he took a fishery, it entitled the respondents to enter into evidence to explain what kind of a right the pauper had taken. If the Sessions had admitted the evidence which was offered, it would have appeared that the lessor of the pauper had not himself such a right as it is stated that the lessee had taken. This is not like the case of land which is necessarily a tenement within the statute, on which account the Court have always refused te enter into the title of the occupier, and where it is sufficient if he hold even under a disseisor; for here it would have appeared that the subject of the demise was not a tenement within the statute.

But supposing that the Sessions did right in rejecting the evidence offered, yet this is a question upon the certificate act (b), and it has never hitherto been decided that an incorporeal hereditament is a tenement within that statute. In the case of the King and Thames Ditton (c), Lord Mansfield said that the poor law was a system of positive law, and that any person claiming a benefit under it must bring himself within the strict letter of it. And besides, if an incorporeal hereditament be a tenement within the statute, it can only pass by deed, and this is stated to be by parol.

Lord Mansfield, Ch. J. Upon this state of the case the Court will consider that the fishery and the soil passed together; therefore the pauper took a tenement within the statute.

ASHHURST,

(a) Ante 241. (b) 9 & 10 W. 3. c. 11. (c) E. 25 G. 3.

ASHHURST, J. There is no doubt but that a fishery is a tenement. Trespass will lie for an injury to it; and it may be recovered in ejectment.

The king against OLD AL-

Buller, J. The Court go upon this ground, that the Sessions have no occasion to go into the title of the lessor at all: The fact of letting a fishery is sufficient, and we must presume that the soil passed along with it. Though I am by no means ready to allow, that if it had been any other kind of fishery, it would not have given a settlement. The Sessions however ought only to admit evidence to controvert the fact of the pauper's taking the tenement.

Order of Sessions affirmed (a).

(a) Vid. R. v. Stoke, post. 2 vol. 451; R. v. Piddlet entbide, post. 8 vol. 772; R. v. Tolpuddle, post. 4 vol. 671; & R. v. Brampton, post. 4 vol. 348.

#### CALLEN against MEYRICK.

Monday, July 3d.

 $R^{EVAN}$  had obtained a rule on a former day, calling on the An executiplaintiff to shew cause why the execution, which had on against been levied by the sheriff under a writ of fieri facias, should a bankrupt not be set aside, and the money levied under it restored to the taken out defendant. The defendant had been declared a bankrupt; after his cerand his certificate had been signed by four parts in five in numsigned by ber and value of the creditors, but not allowed, at the time the credithe writ was executed. The debt existed previous to the tors, and bebankrupicy. This application was made on the authority of fore it is al-Graham against Benton (a), where the bankrupt who had not the chancelobtained his certificate till after judgment, was discharged out lor, is valid. of execution on that judgment. And the case of Bromley against Goodere (b) was cited to shew that "the operative "force of a certificate arises from the consent of the credi-"tors; that the reason of an allowance by the chancellor is " to prevent surprize; and that the certificate, when confirm-"ed, has its effect from the beginning."

Lawrence shewed cause; and contended, that if this execution was regular at the time of issuing it, the Court would not now set it aside, unless they were absolutely bound by some decision so to do. The case of Graham against Benton is not applicable here, because that was only a motion under the 5 Geo. 2. c. 30. to discharge the defendant out of custody;

ind

4786. CALLEN agemut MEYRFOK.

and the words of the statute apply to that relief only; for it enacts that (a) " if any bank upt, who shall have obtained " his certificate, shall be taken in execution, or detained in " prison, on account of any debts due before he became bank-" rupt, by reason that judgment was obtained before such cer-"tificate was allowed and confirmed, such bankrupt shall be discharged out of custody on such execution." statute does not relate to an execution against the goods of the bankrupt regularly obtained before the certificate is allowed

Another answer was attempted to be given to this application, that the defendant had revived the debt by a promise rulsequent to the bankruptcy: but that was not sufficiently made

out.

(b) Cur. adv. velt.

Afterwards, on this day Willes, J. said, that as it had been argued that the stat. 5 Geo. 2. c. 30. extended to executions against the goods as well as against the person of the bankrupt, and the case of Graham against Benton had been cited in support of it, the Court had taken time to look into the subject: but on examination, that case was found to apply only to the discharge of the person; and that it would be directly contrary to the very words of the statute to extend it to an exception against the goods of the bankrupt; And therefore the Rule must be discharged.

(a) S. 13.

(b) Lord Manefield was absent.

Tuesday. July 4th.

## FITZGERALD against WHITMORE.

If plaintiff reside in Ireland, the court will ceedings till he give security for the COSts (4).

DULE to shew case why the proceedings should not be stayed, till the plaintiff, who was an Irishman, and resided at Waterford in Ireland, gave security for the costs, in stay the pro- case a verdict was given against him, or he was non-suited. Wood shewed cause; and observed, that the reason why such a rule had lately been adopted, contrary to the form determinations, in the case of foreigners, was, because A glish subjects who sued in most of the foreign countries Europe, were under a similar necessity of giving security f And that it would be impolitic to extend this rule costs. Ireland.

Buldwin, in support of the rule, said, that the same reas which induced the Court to lay down the rule with respto foreigners, namely, because the process of our courts would

not reach them in case an execution insued for the costs (a), held equally with respect to Irishmen. And

The Court (b), being of this opinion, made the Rule absolute (c).

FITZGERALB

Ggidnet
WHIT MORE.

(e) Anne 267. prov. 491. (b) Absent Lord Manafield and Willes. J. (c) A contrary practice seems to prevail in G.B. wid. Pargust v. Eling; and Parties v. Carter, 1, H. Bt. Rep. C. B. 106.

#### The KING against AMERY.

Tuesday, Yuly 4th.

awarded in

the next

English

A RULE was made absolute, no cause being shewn, on a Upon an motion by Erskine, for leave to enter a suggestion on application the record in this action, "that the corporation and citizens at bar, the "of Chester were interested in the event of this suit, and there-court will fore that a fair and impartial trial could not be had in the interest of the city of Chester."

"county of the city of Chester."

Erstime then moved for a trial at the bar of this Court and cretion upon relied upon the importance of the question to be agitated, the peculiar Lond Holt says that a trial at bar is of common right; and in circumscases of intricacy it is peculiarly requisite. It will be sufficient thereof. The therefore to induce the Court to grant it in this instance, where a fair to state to them the magnitude of the subject in dispute, and trial cannot be variety of issues which are to be tried.

The principal question is, whether the right of electing al-where the dermen in the city of Chester is vested in the citizens at large matter arises, the trial will be

There are twelve issues on this record.

18t. That this is not a body corporate by prescription. 2d. Non concessit to the charter of the 37 of Car. 2.

3d. That the charter of Car. 2. was not accepted, as to the where the election of aldermen.

4th. That certain persons appointed aldermen under that of venire charter did not act as such.

5th. That the mayor, aldermen, and common council, have not used to elect under the charter.

6th, 7th, & 8th. Relate to the qualification and election of the defendant to the office of alderman.

9th. That the charter of Car. 2. was accepted as to all matters contained both in the plea and replication.

10th. That the order of removal in the time of Jac. 2. was not signified.

11th.

1786.

against

ANERY.

11th. That the charter of restoration of Jac. 2. was accepted. 12th. I hat the charters of Hen. 7. and Elizabeth are still in The Kine force.

> These issues must necessarily give rise to many intricate questions of evidence, and in fact go to the very existence of the corporation. In the Maidstone cases (a), the Court granted a trial at bar upon similar grounds, because the question to be tried involved in it the constitution of the borough.

> The Court granted a rule to shew cause. Bearcroft, Cowper, Bower, Leycester, and Manley, shewed cause, and contended, 1st, That the number of issues on a quo warranto information was not of itself a sufficient reason to induce the Court to grant a new trial at bar; for the same reason would equally extend to every quo warranto information. Neither is there any peculiar difficulty arising from these issues to warrant the application: for the principal question is upon the acceptance of the charter of the 27 Car. 2. which must be proved by the records of the corporation.

> But if the Court grant a trial at bar, they cannot summon a jury from the county palatine (b); there never having been an instance of that kind hitherto, except in cases of treason and .crror.

> (a) The Maidstone cases came before the court in Hil. 13 G. 2: under the names of

Rex v. Weldish.

· Rex v Rand.

Rex v. Curties.

These were informations in the nature of quo warranto against the defendants, to shew cause by what title they exercised the office of jurats of the King's Town and parish of Maidstone in Kent: and the question was, whether there ought to be trials at bar?

It was objected against the trials at bar, by Mr. Solicitor General, that there was no reason for it, either upon account of the length or difficulty of the trials, because there was but one single issue that was material, and that was upon a byelaw, which was a fact, the proof of which could not take up any great length of time. As to the other ssues upon the election, swearing, and admission, they were only consequential, and must attend the fate of the issue upon the bye-law.

E contra, it was insisted, that the bye-law was pleaded as a bye-law, not extant in writing, which must depend upon usage; which usage must be proved by

entries out of the books of the corporation.

That there was also another bye-law set out in the prosecutor's replication, though no issue was taken upon it, which would have very great weight upon the trial: and the proof of that would likewise depend upon a great variety of entries, in order to show that it was under that bye-law, and not under the bye-law alleged in the defendant's plea, that the common council had exercised a power of electing jurats.

That the constitution of the corporation depended upon these trials, and that

several points of law might arise in the course of them.

That in Easter Term last the defendants themselves consented to trials at bar, which the court would then have granted, but that the issues were not then joined. That the prosecutor had made an affidavit of all these facts.

Per. Cur. Let there be trials at bar.

(b) 4 Inst. 212.

error. Then 2dly. If the court should not grant a trial at bar, the next question is in which county this information The King shall be tried.

1786. against AMERT:

It is not a matter of right to have a record sent into a county palatine, as being the next adjoining county; and if it be only a matter of discretion in the court, they will not think it adviseable to send this question to be tried in the county palatine of Chester, as the assizes are held in the heart of the city where the parties concerned have extensive connexions who are interested in the event of the trial.

It appears from all the cases (a) upon the subject, that it is not a matter of right to send a record down by mittimus to be tried in a county palatine, unless the matter arise within that county. All the cases upon this subject are collected in the case of the The King and Corvle (b), which arose in the town of Berwick; there though Durham was in fact the next adjoining county, yet the court upon full consideration sent the issue to be tried in Northumberland. Wherever it is suggested that a record should be sent down to be tried in the next adjoining county it means the next county into which the king's writ runs. So where the matter arose in Ireland, the venire was directed to the sheriff of Salop (c), though the Welsh counties, and the county palatine of Chester are both nearer. Again, the whole of Funtshire joins to the county palatine of Ghester, and no part of it to Salop, and yet there is no instance of a record in any action arising in Flintshire having been sent to Chester. Wherever there has been an exception to this gemeral rule, it has always been by consent, as in the case of The King and Johnson (d).
Wilson, Erskine, Wood, and Topping, admitted as to the

first question, that whether there shall be a trial at bar or not, depended upon the discretion of the court; but that discretion ought to be regulated by law, and founded on precedent; and the stat. of Westm. 2. authorizes the party to claim a trial at bar in every question of importance. A quo warranto information on which depends the existence of a corporation is of greater consequence than a mere question of right between two individuals. One of the issues to be tried is, whether the charter of Car. 2. was accepted as to the election of aldermen, and upon that a considerable question of law will Vol. I. Bbb arise.

<sup>(</sup>a) 19 H. 6. fo. 12. b. pl. 31. 2 Rol. Abr., tit. Trial, L. l. pl. 6, 7, 8. Bro. Abr. tit. Trial, pl. 27. 4 Inst. 205.
(b) 2 Burr. 834. (c) 2 Roll. Ab. sit. Trial. L. pl. 8. (d) Hil. 7. Geo. 2.

againet

1786. arise, whether a charter can be partially accepted. Another issue is non concessit, which involves a question, whether the The king can grant otherwise than under the seal of the county palatine; and whether the grant was made to persons capable of taking it. In Lord Sandwich's case (a) the Court said that where there was value and difficulty, they were bound of common right to grant trials at bar.

As to the doubts which have been thrown out respecting the jurisdiction of the court, and their power to summon a jury to their bar from a county palatine, there can be no foundation for them; for wherever the court can send down a record to be tried, they must likewise have a power of summoning a jury from the same place to attend them at their bar. Now here the court might certainly send down this record to the chief justice by mittimus; and if the jury should be summoned to attend at the bar of this court, and they refused to attend upon the ground of an exclusive jurisdiction, the court might proceed against them for a contempt. In the case of The King and Godfrey (b), the sheriff of the city of Canterbury was fined 1001 for returning to a distringas, that the mayor and commonalty of the city were exempted from serving on juries; in consequence of which a jury was afterwards returned. The cause of Lockyer against the East India Company (c) was tried at bar by a special jury of merchants from the city of London, notwithstanding there had been a different decision upon the same point in E. 5 W. and M. (d), by reason, as it was said, of their charter. So also in the case of The King and Lambe (e), an application was made to the court for a new trial, because the warrant for a tales de circumstantibus was only signed by his majesty's attorney general, whereas it ought to have been procured from the attorney-general of the county palatine, but that was held to be no good ground. The case of The King and Johnson (f), which was sent down to be tried by mittimus in the county palatine of Chester, and where a similar question arose upon the acceptance of a charter of the 16 Car. 2. does not appear upon the face of it to have been sent down by consent.

As to the second point: whenever the matter cannot be tried in the place where the cause arises, it must necessarily be tried in the next adjoining county; The King against Harris (g).

(a) Balk. 648. d) Salk 644. Hil. 7 G. 2.

(b) Hard. 389. (e) 4 Burr. 2171. (g) 3 Burr. 1330.

(c) M. 2 G. 3:

This rule is supported by a variety of precedents. One in particular is more immediately applicable. In the case of the Mercers and Ironmongers company of Chester against Radford The King (a), the exchequer court of equity of Chester granted a trial in the county palatine, because an impartial trial could not be had in the county of the city.

against

Such has always been the invariable rule, unless both parties have consented to a trial in another place; and even in those cases, where the matter has arisen in a distant county, and there has been a trial at bar by a jury of the county of Middlesex, the form of the suggestion has always been, that the jury were summoned from the next adjoining county. And in the present case, the county palatine is the next adjoining

county, where the record may be sent by mittimus.

Lord Mansfield, Ch. J. All questions concerning trials at bar must depend upon their own circumstances. Many informations in the nature of a quo warranto, upon which the existence of corporations depended, have been tried at Nisi Prius, and many at bar. The only rule therefore to go by is the judgment which the court shall form on the nature of the issues and their dependences. Now it seems to me as clear as possible that no question of magnitude can arise in this case to render a trial at the bar of this court necessary. Mamy of the issues will admit of no litigation, such as, that it is a corporation by prescription; and the granting in fact of the charter by Car. 2.; and some others are only consequential. The great question is on the acceptance of the charter of Car. 2.; but that cannot involve in it much difficulty. We know the obloquy under which charters granted at that time lie.— As my Lord Hardwicke said (b), they have never received any countenance in Westminster Hall; and he would never give any opinion in support of them, unless the strongest evidence were laid before the court of their having been accepted and uniformly acted under. Therefore there is no ground in this case for a trial at bar.

Then the next consideration is, where it shall be tried.— Now, with regard to that, all local questions which arise in a county palatine must be tried there (c). In the present case, the matter arises locally in the county of the city of Chester. But, by the suggestion which has been entered upon the record, it appears that an impartial trial cannot be had there,

therefore

1786. against AMBRY.

therefore it must be tried in the next county: but that must mean the next county where the king's writ of venire runs. The Ki o The county palatine of Chester cannot be called the next county for this purpose, because the king's writ of venire does not run there. All this I take to have been fully, finally, and in point, established in the Berwick case. And though Northumberland was not there said expressly to be the next county where the king's writ runs, yet it was taken for granted that it was so.

For the same reason, where a matter arising in Wales is tried in the next county, it is never tried in the county palatine of Chester, but always in the next English county where

the king's writ runs.

BULLER, J. It is observable that there is no instance. except that of the King and Johnson, where the court has ever sent a record by mittimus to be tried in a county palatine, where the fact did not arise there; and I very much doubt the power of the Court to do it. It is not quite clear when the doctrine of sending records by mittimus into counties par fatine was first taken up; but in the 11 Wil 3. (a) the court expressly said that they could not order a trial in the county palatine of Lancaster; and therefore they sent the record to be tried in Yorkshire, as being the next county.

Then as to the meaning of the expression of the next English county; it is sufficiently explained in Plowd. 200. where the meason given for directing the venire to the sheriff of Hereford was, because the town of Cardiff was in the county of Gla-morgan in Wales, where a sheriff of this kingdom of England cannot intermeddle. From this reason it is manifest that it must be the next English county where the king's writ of venire That is the only way of accounting for the Welch causes having always been tried in the next English county where the venire runs, and not in Chester, though in fact that

is nearer to Wales.

Rule discharged; And the venire awarded into the county of Salop.

The

(a) Vid, 12 Mod. 313.

#### The KING against EGGINTON.

1786, Tuesday.

THE defendant had received in his character as overseer A specific I of the poor 41, previous to his bankruptcy, which was on sum of mothe 5th of December 1785: but his accounts were not made ney received by an overout till the Easter following; and he had afterwards been seer of the committed (a) to Worcester gaol by two justices, for not pay-poor is not ing over the 41. as the balance of his accounts.

such a debt proved un-

Erskine moved on a former day (b) for a rule to shew as can be cause why a writ of habeas corpus should not issue, directed to der a comthe gaoler at Worcester, commanding him to bring up the mission of defendant, in order that he might be discharged out of cus-bankrupt against him; tody, on the ground that this sum for which he had been com-before his mitted to gaol was a debt existing previous to the bankruptcy, accounts are and might have been proved under the commission; and the delivered in. defendant had since obtained his certificate.

But the court, on account of the situation of the defendant, who was not able to bear the expence of it, dispensed with the necessity of bringing him up by habeas corpus, and granted a rule to shew cause why the defendant should not be discharged out of custody.

Caldecott now shewed cause, and contended that as the defendant was not compellable to give in his accounts till 14 days after Easter, this sum which he had received in his character as overseer was not a debt due at the time when the act of bankruptcy was committed. That it was impossible for any parishioner to have sworn in December 1785, which was prior to the time when the defendant's accounts were delivered in. to the existence of any debt, much less could he have sworn to the quantum of such debt. This therefore was not a debt capable of being proved under the commission.

Erskine, in support of the rule, insisted that when the accounts were delivered in, it appeared that this sum was received antecedent to the bankruptcy. That the accounts specified at what time each particular sum was received; and that the defendant had sworn expressly that this sum of 41 was received by him before the 5th of December 1785. That according to a maxim at law, id certum est quod certum reddi potest, this debt might have been ascertained by any parishioner

(a) 17 Geo. 2, c. 38,

(b) Tuesday, June 27th.

1786. rishioner so as to have enabled him to prove it under the

The King against Eccin-

Lord Mansfield, Ch. J. This money was deposited in the defendant's hands for the use of the parish, which they had no right to call for till a fortnight after Easter 1786; therefore till that time he was able to retain it. But this debt only arises upon the defendant's conversion of it to his own use, which is not till after the bankruptcy. Therefore the defendant is not entitled to be discharged.

Buller, J. This motion can only be sustained on the ground that the parishioners had a cause of action against the defendant before his bankruptcy; but at that time they could not have sued him for this debt. And even if this sum had been kept by itself, the bankrupt's assignees could not have touched it. The defendant was a mere trustee for the parish; and I cannot think that his bankruptcy discharged him

from his office of overseer.

Rule discharged.

END OF TRINITY TERM.

## CASES

#### ARGUED AND DETERMINED

IN THE

# COURT OF KING'S BENCH,

MICHAELMAS TERM.

IN THE TWENTY-SEVENTH YEAR OF THE REIGN OF GEORGE III.

1786.

On the first Day of this Term, John Wilson, Esq. of the Middle Temple, one of His Majesty's Counsel, was called to the degree of Sergeant at Law, and gave Rings with this Motto, "Secundis Laboribus." On the next Day he took his Seat on the Bench in the Court of Common Pleas, in the Room of the late Mr. Justice Nares, and on the 15th November kissed Hands on being Knighted.

### DAVIES against JAMES.

Nov. 6th.

N action, brought in the county-court of Monmouth, Where a de-A was removed by the defendant into this court by a re-fendant recordari facias loquelam: on which the plaintiff's attorney ob- moves protained an order for time to declare; and, within a few days arecorderi afterwards, hear ng from the plaintiff that he would not pro- facias loque. ceed because the cause in the inferior court had been com-lam from a menced to recover only three shillings, gave notice thereof to county the defendant's attorney, who signed judgment of nonpros.

The defendant had obtained a rule last term to shew cause superior why the Master should not tax his costs.

courts, and Baldwin signs judg-ment of non-

pros in de-

fault of the plaintiff's appearing, he is entitled to costs. Where by the writ each party has a day to appear in court, and the defendant may be damnified by the plaintiff's not appearing. be may appear and demand him; and if the plaintiff do not appear, the defendant is entitled sign judgment of nonpres, and to have his costs.

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DAVIES against

Baldwin now shewed cause, and relied on there having been no instance in which the Master had been directed to tax the defendant's costs, when the proceedings were removed from an inferior court by the defendant by a recordari facias loquelam, and when the plaintiff had not appeared; because in actions of this kind the plaintiff cannot be compelled to appear.

He also insisted that the plaintiff could not be considered as having made himself a party to the suit, by his attorney's having applied for time to declare; since that application had been made, not by any authority from the plaintiff himself, but for the purpose of gaining time to learn from him, as he

was in the country, whether he would proceed or not.

Douglas supported the rule on two grounds;

1st, That in all cases when a cause is removed here from an inferior court by a recordari facias loquelam, and the plaintiff does not prosecute his suit, the defendant is entitled to sign judgment against him, and to have his costs. The word nonsuit, as used in the statutes (a), extends to nonpros; for it means any relinquishment of the suit. The Ma-ter's doubt arose from a dictum, which is to be found in the books of practice, that when the defendant removes a cause from an inferior court, he cannot nonpros the plaintiff for not declaring, because the plaintiff is not bound to follow him. But that rule only holds in cases where the cause is removed by habeas corpus, and not by recordari; which distinction is evidently founded on this reason, that in the former case the record itself is left in the inferior court, and only an account or history of the proceedings transmitted to the superior one (b); but in the latter case, the original process is made a record of this Court. The plaintiff can have no just reason to complain of any hardship by the Court's compelling him to follow the suit here, because the defendant cannot remove it by recordari without assigning a sufficient cause (c) to warrant the removal; the writ itself expresses it. And as the defendant was entitled to sign judgment of nonpros he is likewise entitled to have his costs. But.

2dly, If the plaintiff were not bound to follow the suit here, yet in this particular case he has made himself a party to the suit in this court, by applying for a rule for time to declare. This brings him into court as much as if he had actually filed

his declaration.

Buller,

<sup>(</sup>a) 23 H. 8. c. 15. 13 Car. 2, et. 2. and 4 Yec. 1. c. 3. (b) Salk. 352. (c) Fits. N. B. 70.

1786.

D A VI E&
against

LAMES.

BULLER, J. The master thought in this case that he was not at liberty to tax the defendant his costs under the 13 Car. 2. st. 2. c. 2; and I agree with him in that; because that act is confined to suits commenced in the superior courts. But a prior statute (a) makes this matter very clear, which says, that if a party be entitled to his judgment, he is entitled to costs. Then the question is, Whether the defendant be entitled in this case to his judgment? That depends on the nature of a recordari. There is no such distinction between an habeas corpus and a recordari as the defendant's counsel has taken, as far as relates to this point; for an habeas corpus does remove the suit. Lord Chief B. Gilbert, in his law of Replevin (b), says, in a habeas corpus the plaintiff must follow the body of the prisoner.

The general rule is, that where by the writ each party has a day in court, and the defendant may be damnified by not appearing, he may appear and demand the plaintiff, and this even though the writ be not returned; as upon a capias, exigent, or distringus. 28 Ed. 3. 20. 3 H. 7. 8. pl. 10. Gilb. Law of Rep. 138. Then what is a writ of recordari? It is a summons to both parties; for it requires the sheriff to record the plaint, to have it in court on a certain day, and to prefix that day to both parties, that they may be there. Fitz. N. By this writ therefore both the parties have a day; and the defendant, being bound to appear, may be damnified if he does not: then if the plaintiff do not appear, the defendant is entitled to judgment. It follows from hence, that he is likewise entitled to his costs; not indeed on the statute of Charles the Second, but on that of 4 Fac. 1. c. 3; whereby if any person shall commence any action in any court, wherein the plaintiff or defendant might have costs, in case judgment should be given for him, and the plaintiff after appearance be non-suited, or a verdict pass against him, then the defen-The words of the statute " in any dant shall have his costs. "court" are not confined to superior courts.

Per Curiam (c).

Rule absolute (d).

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(a) 4 Jac. 1. c. 3. (b) 145. (c) Willer, Justice, was not able to attend the whole of this term, on account of illness.

<sup>(</sup>d) To a question from the Bar the next day, Whether it was to be understood that the decision had been made solely on the ground of the plaintif's having appeared in this court by the order for time to declare, The Court (Ashhurst and Buller, Justices,) answered in the negative.

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Wednesday, The KING against Sir WATTS HORTON, Bart. and Nov. 8th. Another.

Where a pa-RULE had been obtained last term, calling upon the A RULE had been obtained last term, calling upon the defendants, who were justices of the peace for the counrish consists of several ty of Lancaster, to shew cause why a mandamus should not townships, some of issue, commanding them to appoint two overseers for the which main. township of Pilsworth in the said county. tain their

This motion was founded on affidavits, which stated that the parish of Middleton consists of eight separate and distinct immemoritownships or villages, to wit, Middleton, Thornham, Hopwood, ally had overseers se- Pilsworth, Birtle cum Bamford, Ashworth, Ainsworth, and parasely ap- Great Lever, each of which has immemorially had a separate pointed, the constable and church-warden. That Ainsworth and Great Lever, from time immemorial, and Ashworth for the space of mandamus about seventy years, have had separate overseers. That befor the separation of Ashworth, there was a joint appointrate appoint. ment of six overseers for the six townships, one out of each, verseers for who made a general rate or assessment for the poor of all the the remain- six townships, and that each overseer acted within his own township; but that at the end of the year there was a general Where such settlement of all disbursements, and the expences borne a parish has equally by all. That since the separation there has been a immemorial-like joint appointment of five overseers for the remaining ly had more five townships, who have acted in the same manner as before seers, that is the separation. That the parish of Middleton could not reap a proof that the benefit of the 43 Eliz. in relation to the maintenance, relief, they cannot and government of its poor, on account of its largeness, be-have the benefit of the ing 14 miles in length and 10 in breadth, and also on account 43 Eliz. and of its great population, and because three out of the said eight entitles each townships maintained their own respective poor. That the township to defendants were requested at the last annual meeting to aphave sepapoint two overseers for the township of Pilsworth, which they refused.

On the other hand, several affidavits were read against the rule, which stated that the parish of Middleton consists of there there is four distinct and separate townships, viz. Middleton, Ashworth, a township. Ainsworth, and Great Lever, and that the township of Middle. ton consists of five separate hamlets or precincts, and not separate townships. That the rates and assessments had been made generally for the township of Middleton at large, and not for

for each separate district; and that the overseers accounts had been made out in the same manner.

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Erskine and Shepherd shewed cause against the rule, and The KING contended, that in order to lay a ground for the court to grant Sir WATTS the mandamus, it would be necessary to shew two things; Ho TON. 1st, That this district of Pilsworth is a township; and, 2dly, That it cannot enjoy the benefit of the stat. 43 Eliz.

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As to the first; it appears that Pilsworth is only a hamlet, which, with four others, constitutes the township of Middleton, and is not a township of itself: For it is stated, That the overseers have been appointed, and the assessment made, from time immemorial, generally for the township of Middle-

ten, and not for the five districts separately.

2dly, It does not follow that though Pilsworth should be a township, yet that it must be separated. The affidavits should have stated special grounds for the Court to see that Pilsworth was precluded from enjoying the benefit of the 43 Eliz. But they only state generally that the parish of Middleton, of which it is a part, cannot reap the benefit of that statute, without alleging any other reasons than those of the largeness and population of the parish; and that three districts had already been separated from the other five. In the case of Peart and Westgarth (a), where the parish was larger than in the present instance, the Court did not think that a sufficient reason for dividing it. And, as to the extent of its population, no additional encrease is stated from whence any new inconvenience has arisen; but on the contrary the circumstance of the three townships having been separated affords a reason for refusing the rule, as the number of inhabitants in the remaining districts must be considerably less than that of the whole parish before such separation took place. The township of Middleton has hitherto enjoyed the benefit of the statute of Eliz. without interruption. And even in the case of Peart and Westgarth, where there had been a contrary usage for 40 years under an order of sessions, this Court was of opinion, that, as the inability of the parish to reap the benefit of the statute of Elizabeth did not appear, the overseers ought not to be appointed by virtue of the 13 and 14 Car. 2, c. 12. In the case of the King and Uttoxeter (b), the same rule was established.

It is stated in the affidavits, that each of the five overseers did the duty of his particular district; the same reason was relied upon in the case of the King against the justices of

<sup>(</sup>a) 3 Burr. 1610.

<sup>(</sup>b) Dougl. 332. Cald. 84.

Middlesex (a), where overseers had always been appointed for the parish of Kentish Town, which included Pancras; out of The King which latter place one of the overseers had constantly been tagainst Sir WATTS HOLFON, urged as a ground for dividing the parish, but the Court said and Another than the was only an internal regulation, and they refused the mandamus.

Bearcroft and Cockell, contra, contended that where there is a constable, there is necessarily a township. Here it is

agreed on both sides that there is a constable.

But what is decisive in the present case is, that it appears to have been always necessary for the parish of *Middleton* to have *five* overseers, which is a proof that it could not enjoy the benefit of the 43 Eliz. which confines the number to four.

They were then stopped by the Court.

ASHHURST, J. This is a very plain case. It has been sregued against the rule, that if the Court should grant a mandamus to appoint separate overseers for the township of Pileworth, one of the five remaining districts, it will necessarily follow, that the others will be entitled to the same privilege. But that argument applies equally the other way; for as soon as the other three townships were separated, the remaining five had a right to be so. It is clear that the parish, as a partish, cannot have the benefit of the statute 43 Eliz. because it has always had a greater number of overseers than are allowed by that act. Therefore, upon that ground, as well as upon the former, that the other three townships have had separate overseers, I am of opinion that the five remaining ones are also entitled to have them.

Buller, J. The parties applying for this rule must necessarily make out two points before they can succeed. First, that this is a township. And, secondly, that it cannot have

the benefit of the 43 Eliz.

The last is the point which has been most relied on: for as to the first, it certainly is a township. Wherever there is a constable, there there is a township. There may be a constable for a larger district than a township, but not for a smaller. The doubt in many of the cases, whether such a place was a township or not, has arisen where there was no constable.

Then the remaining question is, Whether the township of Pilsworth can have the benefit of the 43 Eliz.? What is a decisive answer against that is, that the other three townships have separate overseers. We must consider what is meant

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by the benefit of the statute. It is that the parish may maintain their own poor, as a parish; for unless they can do it, as such, they cannot have the benefit of that statute. Now it The King is here stated, that three of the townships maintain their own Sir WATTS poor; but unless they all join, they cannot reap the benefit HORTON. of the statute.

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It has been argued, that the parties applying for the mandamus should have shewn special reasons to the Court why they cannot have the benefit of the statute. But in fact they have done so; for they have stated the largeness of the parish, and its great population, which circumstances are not denied by the other side. Independently of these reasons, another ground laid for the mandamus is, that the five remaining townships require five overseers. If from necessity they must have five overseers to govern their poor, that affords a strong argument to prove that even if these five comprehended one parish, independent of the other three, yet they could not enjoy the benefit of the 43 Eliz. which allows only four OVERSCETS.

.The cases which have been mentioned were all rightly decided, but they do not apply to the present. As to the case of Peart and Westgarth (a), the parish had enjoyed the benefit of the statute of Elizabeth for 120 years. After such a length of time, the Court said that they must have shewn to them some strong reasons to induce them to believe that it could not be continued, before they would appoint overseers in a different manner from that pointed out by the statute of Eliz. notwithstanding any intervening custom for 40 years: but no sufficient reason appearing, they directed one joint appointment for the whole parish. Next, as to the case of the King against the justices of Middlesex (b), it appeared most clearly that the parish of Kentish Town could have the benefit of the statute of Elizabeth. There were two overseers appointed for the whole parish, which was sufficient to answer the purposes of the statute. Then as to the case of the King and Uttoxeter (c), the answer to it is, that the parish did not shew that they could not have the benefit of the 43 Eliz.

Per Curiam (d).

Rule absolute (e). BIRCH

<sup>(</sup>a) Burr. 1610. (b) Bott. 17. (c) Dougl. 332. (d) Ld. Manefield was not able to attend on this or any subsequent day in the

<sup>(</sup>e) Vid. R.v. The Inhabitante of Leigh, post, 3 vol. 746; and R. v. T. Newell, post. 4 vol. 266.

1786. Friday. Nov. 10th.

### BIRCH against WRIGHT.

An action for use and occupation may be maintained of an annuity after a recovery in ejectment against a tenant, who was in possession unfrom year to year, for

all rent in the time of notice by

the grantee and down to the day of the demise in the ejectment; but not afterwards.

'HIS was an action for use and occupation, tried at the Sittings at Westminster, after last Easter Term, before Buller, J. when a verdict was found for the plaintiff, subject to the opinion of the Court of King's Bench, on a case which by a grantee stated in substance as follows:

That the defendant, before the 18th of July 1777, was tenant from year to year of the lands in question to Mr. Bowes. at the yearly rent of 2231. 10s.—payable half yearly, viz. on

the 12th of May and the 22d of November.

That by indenture of 18th of July 1777, Mr. Bowes and his wife Lady Strathmore granted annuities to several persons der a demise therein named for the life of Lady Strathmore; and they covenanted to levy a fine to the use of the plaintiff and Mr. Goostrey (who is since dead) upon trust to receive the rents his hands at and pay the annuities out of them, and then to pay the residue to Mr. Bowes and Lady Strathmore. That a fine was levied accordingly.

That the defendant paid all the rent which was due on the 22d of November 1784, except 811. 158. to Mr. Bowes, which sum of 811. 15s. is still unpaid; and no rent has been paid by

the defendant since that time.

That in May 1785, the plaintiff and Goostrey brought an ejectment against the defendant, and laid the demise on the

6th of April 1785.

That in Trinity Term 1785, they obtained judgment; and in September 1785 gave notice to the defendant of their title, and required him to attorn to them and to pay to them the money already in his hands: but the defendant refused to attorn, and thereupon a writ of possession was executed, and the defendant quitted the premises mentioned in the declaration.

That Lady Strathmore is still living.

The question for the opinion of the court is, Whether the plaintiff is entitled to recover any and what sum of money in this action?

This case was argued in last Trinity Term by Chambre for the plaintiff, and Law for the defendant; and again on this day by Cowper for the plaintiff, and Mingay for the defend-But as the Court in giving judgment went so fully into all the points made, and cases cited, at the bar, it is thought unnecessary to state the arguments at length.

Ashhurst,

ASHBURST, J. It is very material to distinguish the different dates and times. From the 6th of April 1785 to the time of recovering in the action of ejectment, in my opinion the plaintiff is precluded from recovering in this form of action; for that would be blowing both hot and cold at the same time, by treating the possession of the defendant as that of a trespasser, and that of a lawful tenant, during the same period. The plaintiff cannot first recover in ejectment, and then for use and occupation for the time subsequent to the day of the demise in such ejectment.

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But as for the rent due antecedent to the time of the demise, there is no doubt but this action is maintainable. For the statute of the 4th of Ann. having rendered attornment unnecessary, and having put the party in the same situation by the conveyance as if the tenant had attorned, he is to be considered in possession; and then, as there is no deed between these parties, he may maintain this action for use and occupation. Moss v. Gallimore (a) is expressly in point, and stronger than the present case. So that the plaintiff may recover all the rent due at the time of notice given which remained in his hands, and must be considered as landlord from such time, provided the tenant be not prejudiced by the payment of any rent before notice.

The question then is, whether bringing an ejectment is a bar to an action for use and occupation for rent due before the time of the demise? In my opinion it is not, for the actions The landlord admits him to be tenant are not inconsistent. till the 6th of April 1785, and consequently is entitled to rent before that period; and after that he considers him a tres-

passer.

BULLER, J. Upon this case two questions have been argued;

1st, Whether the plaintiff be entitled to any of the rents and profits of the lands occupied by the defendant; and,

2dly, Supposing him to be entitled to them, whether he can recover them in this form of action?

The material thing to be considered is, who are the parties in the business, and what are their respective interests.

First, I will begin with the defendant, who is the tenant. He originally came into the estate as tenant from year to year to Mr. Bowes; he was so at the time of the conveyance from Mr. Bowes to the plaintiff, and he continued to hold the estate, as such, without any new agreement or notice of the conveyance till the ejectment was brought. Whilst he was tenant to Mr. Bowes, he clearly was entitled to six months notice

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notice before the end of a year to quit, and he could not have been turned out without it. I hold that he was entitled to the same notice from the plaintiff before he could be evicted; for as the plaintiff claims under a conveyance from Mr. Bowes, he cannot be in a better situation than Mr. Bowes himself was. He stands exactly in the place of Mr. Bowes, with this difference, that his title is subsequent to the title of the defendant. I meation this difference only for the purpose of at once laying the case of Keech and Hall, Dougl. 21. out of the question. There a mortgagor made alease for years subsequent to the mortgage, and that lease was holden to be void as against the mortgagee.

In this case I consider the defendant as holding during all the time under a demise made before the conveyance to the plaintiff. For if a tenant from year to year hold for four or five years, either he or his landlord at the expiration of that time may declare on the demise as having been made for such a number of years. So it is expressly laid down by the Court in Legg v. Strudwick, Sulk. 414.; though in the next preceding page there are two cases which at first seem to have been determined otherwise; the one in the court of Common Pleas the other by Holt, Ch. J. at Nisi Prius: but those are short loose notes jumbled together with others, and not to be relied Besides, when those cases are examined, they will be found not to contradict the case of Legg v. Strudwick. That in the Common Pleas was Bellusis and Burbrich; and Solkeld (a) states it thus: on a lease made for a year, and so from year to year so long as both parties pleased, it was adjudged a lease for two years, and afterwards at will. The same case is reported in Lutw. 213; and it was an action for a rescue; and the plaintiff stated in his declaration a demise for a year, and so from year to year, &c., and he distrained for a year and an half's rent. It was objected that the lease determined at the end of one year, and so the plaintiff could not distrain for the rent of that year and half a year more: but it was answered and so agreed by the Court, that it was a good lease for two years at the least. Two years covered the whole time which was material in that case; it was quite unnecessary to say what would be the effect of the lease after the two years, and therefore the Court said nothing about it. Much less did they say that after the two years it was only a lease at will; on the contrary, the expression of at the least, imports that it might be good for more. The other is a case said to have been determined by Holt, Ch. J. at Nisi Prius at Lincoln; and Salk-

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BIRCH

against

eld reports it that: If A demise lands to B. for a year, and so from year to year, this is not a lease for two years and afterwards at will, but it is a lease for every particular year, and after the year is begun the defendant cannot determine the lease Waggar. before the year is ended. But in a lease at will, the defendant may determine his will after the payment of his rent at the end of a quarter, but not in the beginning, lest his lessor should lose his rent. In that case the question seems to have been whether, after the third year commenced, the lessor was entitled to the whole year's rent, and Holt, Ch. J. held that he was; because the tenant could not determine the estate in . the middle of the year. And the expression for every particular year, does not mean that such a lease operates as a distinct demise for each year separately, but that when any year has commenced, it is good for the whole of that year. Besides, if the case admitted of any other construction, yet after Legge and Strudwick, which was decided by Holt himself in this court ten years afterwards, it is impossible to entertain a doubt about it.

It would be unjust to a tenant to say he should be turned out by the assignee of a reversion, or by any person claiming under his lessor, when he could not be turned out by the lessor himself. On the other hand it is no injustice, it is no hardship on the assignee to say, he must comply with the same rules and conditions as the person of whom he bought

has subjected himself to.

Whether the plaintiff be considered as a mortgagee only, or as a purchaser, or assignee of the reversion, it will make no difference in this part of the case. His title first accrued in July 1777; it was too late then to give notice to the defendant to quit at the end of the current year, for that expired on the 22d of November. The defendant, therefore, at the time that the plaintiff's title accrued, had as permanent an interest in the estate till the 22d of November 1778, as if it had been leased to him by deed till that time. He had also a further interest in it, unless determined by six months notice previous to that time; which notice never having been given, he continued rightful tenant to some one down to the time that the ejectment was brought.

This brings me to consider who is entitled to that rent? That depends on the nature and effect of the conveyance from Mr. Bowes to the plaintiff, and the operation of the statute of the 4th Ann. c. 16. And whether it be considered as a mortgage, or as an absolute grant of the reversion, in my opinion it will make no difference. There is in some respects an ana-Ddd logy Vol. I.

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Buch againet WRIGHT logy between this case and the case of a mortgage, for it is a security for money; the annuities or rents are to be paid out of the rents and profits, and then the remainder of those rents and profits is to be paid to Mr. Bowes. So in the case of a mortgage, till the principal is called for, the interest is to be paid out of the rents and profits, and the remainder is to be retained by the mortgagor. In both cases the borrower would be liable to pay it, if the rents and profits were not sufacient; but that is by virtue of his covenant. In other respects this case is not at all like a mortgage; for a mortgage is always in its nature redeemable, but these annuities are not made sow And I hold that this is a grant of the reversion.

and not a mortgage.

But I will first state how the case would stand, supposing Mr. Bowes and the plaintiff are to be considered as mortgagor and mortgagee. In that light it would be said that there is an implied agreement between the mortgagor and the mortgagee, that the mortgagor shall hold as tenant at will to the mortgagee, paying the interest from time to time, and the principal when called for. If the mortgagor be tenant at will. he is entitled to the rents and profits till that will is determined: and whenever the will is determined, it cannot have relation back to a former time; because that would be by a subsetruent act to make an estate tortious which was rightful at the time it existed. That a mortgagor has often been called a tonant at will to the mortgagee in courts of law and equity is undoubtedly true, but I think inaccurately so; and the expression has been used when it was not very material to ascertain what his powers or interest were, or to settle with any great precision in what respects he did, and in what respects he did not, resemble a tenant at will. In old cases he is sometimes called tenant at will, and sometimes tenant at sufferance. Keech v. Hall. Wallace called him the agent of the mortgages. and Lord Mansfield stated him to be tenant at will to some purposes, but not to others. In Moss v. Gallimore, Lord Mansfield said a mortgagor is not in reality a tenant to the moregagee; if he were he must pay rent, but that is not so. To many purposes he is like a tenant at will; but he does not pay rent; he must pay interest only. Mr. Justice Ashturst said " in some respects a mortgagor is strictly tenant at will !" but that is not so here; for the mortgagor is not in posses. sion, and there cannot be a tenant to a tenant at will. tenant at will lease, it determines the will.

Whoever

Whoever wishes to wade through all the old books on this subject will find a great collection of cases in Comyns's Digest, title, Estate, l. H. But it is an Herculean labour; and, with the opinion which I hold, namely, that this is not a mortgage, it would be quite useless and immaterial in the present case.

BIRCH against WRIGHT,

Whenever it is necessary to decide a similar question between the mortgagor and mortgagee, it seems to me that it will be quite sufficient to call them so, without having recourse to any other description of men, or to what they are most like, But if a likeness must be found, I think, as it was put by Ashhurst, L in Moss v. Gallimore, a mortgagor is as much, if not more, like a receiver than a tenant at will. In truth he is not either. He is not a tenant at will, because he is not entitled to the growing crops after the will is determined. He is not considered as tenant at will in those proceedings which are in daily use between a mortgagor and mortgagee; I mean in ejectments brought for the recovery of the mortgaged lands, If he were tenant at will, the demise could not be laid on a day antecedent to the determination of the will (a). But it is every day's practice to lay the demise on a day long before there has been any actual determination of the will; sometimes back to the time when the mortgage became forfeited, and no objection has ever been made on that account. He is not a receiver; for, if he were, he would be obliged to pay all the. repts and profits to the mortgagee, which is not the case. Two things which differ from each other in any respect canno be the same; therefore he is neither tenant at will, nor receiver. Nor is it necessary that he should be so; for a mortgagor and mortgagee are characters as well known, and their rights, powers, and interests as well settled, as any in the law. possession of the mortgagor is the possession of the mortgagee; and as to the inheritance, they have but one title between The mortgagor has no power of making leases to bind the mortgagee. He cannot against the will of the mortgagee do any act to disseise him. Gro. Jac. 660. Gro. Car. 304. 3 Lev. 388. and Skin. 424. And the reason is, because the mortgagee, so long as he receives his interest, is virtually and in the eye of the law in possession. The mortgagee has a right to the actual possession whenever he pleases; he may bring his ejectment at any moment that he will; and he is entitled to the estate as it is with all the crops growing on it. He is also entitled to all the ronts which have become due since his mort-

<sup>(</sup>a) Vid. Goodtitle d. Gallaway v. Herbert, poet, 4 vol. 680.

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mortgage, and which are unpaid; as was determined in Moss and Gallimore, which case I hold to be sound law; and I am desired by Lord Mansfield to declare, that, on consideration, he is most perfectly satisfied with that decision. The case was, that one Harrison, having demised an estate to the plaintiff for 20 years, afterwards mortgaged it to the defendant, who, without having ever been in the actual possession of the rents, distrained on the plaintiff for rent in arrear, and the distress was held lawful. The legality of the distress depended on the stat. 4 Ann. c. 16. Before that statute, if a reversion were granted over by deed which operated only as a common law conveyance, without attornment the grant itself was void to all intents and purposes. But it was not so where the grant was by fine or by deed of uses, on which the stat. 27 H. 8. operated; for, in the case of a fine, the estate passed to the conusee and his heirs, and an attornment in that case was necessary only to make a privity between the tenant and the conusee, and, if made after the death of the conusee to his heirs. was sufficient. Where the reversion was conveyed by a deed of uses, the grantee might distrain without any attornment at all. Co. Lit. 309. 6 Co. 68. Cro. Jac. 192. The statute enacts. that all grants or conveyances thereafter to be made by fine or otherwise, of any manors, rents, reversions, or remainders, shall be good and effectual to all intents and purposes, with out any attornment of their tenants, as if their attornment had been made. This clause comprehends all grants and convey ances, and therefore whether it be a grant by way of moregage, or of the fee-simple, or only of the reversion for a term of years, as in the present case, it makes no difference. And the effect of the clause is, that it creates an immediate privity between the grantee and the tenant. It cannot be restrained merely to the making of the grant good as between the grantor and grantee; 1st, because it expressly mentions grants by fine; and they were good to all purposes before without attornment, except as to creating such a privity as would enable the grantee to distrain; 2dly, because the statute says the conveyance shall have the same effect as if an attornment had been made. Now if an attornment in fact were made before the statute, there can be no doubt but the grantee was perfect landlord to the tenant, and entitled to all the rents accruing due from the time of the attornment; though according to Co. Lit. 310. b. it would not have entitled him to the rents which became due between the time of the grant and the time of the attornment; which is contrary to what the plaintiff's counsel counsel have contended on this point, namely, that the at-

tornment would relate back to the time of the grant.

The legislature having gone the length of making the grantee a perfect landlord without the knowledge of the tenant, it occurred to them that mischiefs might ensue by leaving the tenant open to a distress or action for the rent at the suit of a person of whom he knew nothing, and after he had paid his rent to his original landlord; and therefore they prudently added the proviso, that no person should be prejudiced by payment of rent to any grantor or conusor, or by breach of any condition for non-payment of the rent, before notice should be given to him of the grant by the conusee or grantee. I say they prudently added that proviso, because perhaps it was not absolutely necessary; for the wisdom, the benevolence, and the liberality of the common law had made the same prosion before.

The case of Sir John Watts and Others v. Ognell, Cro. Jac. 392. is a strong proof how much equity and good sense have always prevailed in the law. That case was debt for rent by the assignees of a reversion under a fine levied to their use. Several objections were made in arrest of judgment; one of which was that the declaration was not good, because it was not alleged that the lessee upon this grant by fine attorned, nor that he had any notice of the use limited; and even if he might avow without attornment, yet notice ought to be given to the lessee, for otherwise he should be at mischief; for the use might be limited, and he not having conusance thereof might pay his rent to his ancient lessor. Of this point the Court doubted; but afterwards they held that the action was well brought, and that notice need not be alleged in the declara-But they agreed that the lessee, is not bound to pay without notice; and if he hath paid it to his ancient lessor, it is a good excuse for him, and he may plead it; and if he hath not paid it, the action gives him notice to pay it to the grantee, and then he is chargeable for all which was not paid. This case, though decided almost 100 years before the passing of the act of Queen Ann, where actual attornment was not necessary, established the same rule which the act professes to make. And it is a case well worthy of observation; for, 1st, It shows how much the common law regarded and required notice, where a person had not the means of knowing; for at that time there was no statute which required notice to be given. 2dly, It shows that where attornment is dispensed

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against
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with or supplied by a statute, the grantee has as complete and perfect a title as if attornment had actually been made. Sdly, This case fortifies an argument, on which I relied much in the case of Moss and Gallimore, drawn from the form of pleading, namely, that since the statute an attornment never is alleged either in a declaration in covenant, or in an avowry; which can only be because it is supplied by the statute, and therefore unnecessary. And, 4thly, It proves that nothing can excuse the lessee from paying the rent to the assignee, but actual payment to the original lessor without notice of the grant; and, if that be his case, he may plead it.

From hence I conclude that the plaintiff was the landlord of the defendant. He had a clear legal title which he could support upon pleading, either in an action of covenant, or in avowry; and the tenant was answerable to his action, unless he could allege some legal bar in his defence, and which I think he could only do by shewing payment to the grantor be-

fore notice.

The first proposition which I laid down was, that the defendant under his first demise continued rightful tenant to some one till the time when the ejectment was brought. And now I say that that some one, during all the time that the rest in arrear accrued, was the plaintiff. Consequently the plaintiff is entitled to maintain an action for use and occupation against the defendant for all that is due and unpaid, as rest during the time that the plaintiff was landlord and the defendant had the premises as his tenant.

But then another question remains to be considered, namely, down to what time the plaintiff is entitled to recover that

rent in the present action.

For the plaintiff it was contended, that he had a right to recover it down to the time of ex cuting the writ of possession; and to establish this point four cases were quoted.

1st, A Nisi Prius determination cited in Cowp. 246. There is no name to it; but it was tried at Launceston assizes when Gould, J. was at the bar; and there the lessor of the plaintiff in ejectment had likewise brought an action for use and occupation of the same premises for rent which had accrued subsequent to the time of the demise. Both actions came on to be tried at the same assizes; and in the action for use and occupation it was objected that it was an action founded on promises, and a supposed permission by the plaintiff to the defendant to occupy, therefore, an acknowledgment on the part of the plaintiff that he was tenant, and consequently a waiver of his

BIRON against Wason T

his notice. But the objection was over-ruled, and the plaintiff recovered, first in the ejectment, and afterwards in the action for use and occupation. This at best is but a Niei Prius determination; and I can find no principle whatever on which to support it to the extent to which it goes. If the plaintiff recovered only in the action for use and occupation to the time of the demise in the ejectment, which he might de notwithstanding his declaration claimed the rent to a later period, I think the case is good law. But if he recovered rent due after the demise, I cannot give my assent to it. For the action for use and occupation is founded on contract; and unless there were a contract either express or implied, the action could not be maintained; as was held by lord Mansfield in the case cited at the bar of Carmier v. Mercer, which was tried about two years ago. And if there were a contract subsisting at the time of the demise, the ejectment could not be maintained.

Two other cases quoted were Hambly v. Trott, Cowp. 371. and Goodtitle v. North and Others, Dougl. 562. But as those cases do not seem to me to apply to the present, I shall pass them over. They only relate to the questions, what actions may be maintained against an executor or a bankrupt and what die with the person, or are barred by the certificate.

The last quoted was Feltham v. Terry (a), where an action for money had and received was brought against an overseer of the poor to recover money in his hands which had been levied on a conviction, but that conviction was afterwards trushed; and the court held that the action was maintainable for the clear money in the defendant's hands, because the plaintiffs might wave the tort and sue for the clear money really due. I agree that he may do so; but in the present sase the plaintiff has not waved the tort: he has brought his ejectment and obtained judgment on it, which is insisting on the tort; and he cannot be permitted to blow both hot and rold at the same time. The action for use and occupation, and the ejectment, when applied to the same time, are totally inconsistent; for in one the plaintiff says the defendant is his tenant, and therefore he must pay him rent; in the other he says he is no longer his tenant, and therefore he must deli-Ver up the possession. He cannot do both. The plaintiff's counsel admit that an action would lie for the mesne profits; it is of course after ejectment, and may be maintained without proving any title. The ejectment is the suit in which the defendant

(a) B. II Geo. S. B. R. cited in Grop. 419.

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defendant is considered as a trespasser; and, unless the judgment in ejectment be laid out of the case, the tort is not wav-The defendant stands convicted on record by judgment

as a trespasser from the 6th of April 1785.

Therefore I am of opinion, that the plaintiff is in this action entitled to recover the 811. 15s. which remained unpaid as part of the half year's rent due on the 22d of November, and also a proportional part of the rent up to the 6th of April 1785: the defendant having continued tenant to the plaintiff up to that time, which is the day of the demise laid in the declaration in ejectment. But I think he is not entitled in this action to recover any rent subsequent to that day.

Let the postea be delivered to the plaintiff.

Eriday, Executors of WRIGHT, Bart. against NUTT in Error. Nov. 10th.

Executors. against whom a ecire facias is sued out to ages assessed on an interlocutory judgment testator before his death, cannot bring error, if the torneyagreed for him of error should be brought in that action. The court on motion will order the attorney to nonpros

the writ.

HE present defendant, who was plaintiff in the original action, obtained an interlocutory judgment against the testator, and executed a writ of enquiry. Pending that action, the testator's attorney agreed that no writ of error should be recover dam. brought. After the testator's death, a scire fucias, to shew cause why the damages assessed by the jury should not be adjudged to the plaintiff, was sued out against the executors; who thereupon brought a writ of error. A rule having been against their granted against the attorney to shew cause why he should not nonpros the writ of error, as having been brought contrary to his agreement, by which it was insisted that the executors were bound;

Mingay and Law now shewed cause; contending that the testator's at: agreement entered into by the testator's attorney not to bring a writ of error in that action was not binding upon the executhat no writ tors in the present case; because a scire facias is considered as a new action, though it must pursue the first (a). as the defendant died between the time of executing the writ of enquiry and final judgment, this case was in some measure omitted out of the statute of 8 and 9 W. 3. c. 11. s. 6. which had only declared that, if the defendant died after interlocutory judgment and before final judgment signed, the plaintiff should have a scire facias against his executors to shew cause why damages should not be assessed: but in the present case the damages have been assessed by executing the writ of en. quiry.

(a) Gro. Fac. 331. Hob. 4.

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Nutt.

quiry. Therefore, if the statute did not apply, it stood as at common law, and the suit abated by the death of the parties.

Cowper and Erskine in support of the rule, observed that this was not an action on the former judgment; but only a scire facias calling on the executors to shew cause why the damages which had been assessed on executing the writ of enquiry should not be paid. This is within the statute of 8 and 9 W. 3. c. 11. Goldsworthy v. Southcott (a). As this therefore was a continuation of the same action, the undertaking entered into by the testator's attorney bound his executors.

ASHRURST, J. This is not a new action, but a continuation of the old one; it is only a scire facias to revive the former judgment. And as the testator himself, if he had lived, could not have brought a writ of error in consequence of the agree-

ment, neither can his executors.

Per Curiam.

Rule absolute.

(a) 1 Wile. 243.

DOE, on the several Demises of the Dean and Chapter of WESTMINSTER and Others against FREEMAN and Nov. 10th. Wife.

THIS was an ejectment brought to recover the possession Under a deof two messuages at Harpenden. The plaintiff claim-vise to a ed, 1st, On the demise of the Dean and Chapter of Westmin-wife for life, ster, lords of the manor of Harpenden; 2dly, on the demise remains a of George Bruton and John Surry; and 3dly, On the demise widow, but in case she

of John Surry.

The cause was tried at the Sittings after last Trinity Term cond husat Westminster, before Buller, J. when the jury found a ver-band, then dict for the plaintiff, subject to the opinion of the court of to J. S.

King's Bench on the following case;

That William Warraker, being seised according to the attain bis age of 23 years, custom of the manor of Harpenden, by his will dated the 25th the wife has of October 1781, devised as follows; "I will give and devise an absolute unto my loving wife Sarah Warraker all that my copyhold estate ill J. messuage or tenement wherein I now dwell, with the appurthough she tenances thereto belonging, situate in Harpenden, at the time marry of my decease, for and during the term of her natural life, before. provided she remains a widow, and does not marry a second husband; but if in case she marries a second husband, then I

give will and devise the said copyhold messuage or tenement, and all and every the appurtenances as above-mentioned, unto Vol. I. E e e my

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Doe against FREEMAN.

my nephew John Surry, son of my late sister Elizabeth Surry, lately deceased, when he shall attain his full age of 23 years, to have and to hold unto him and his assigns for ever; but upon condition that he my said nephew John Surry shall pag unto my two nephews George Bruton and Richard Bruton, sons of my late sister Sarah Bruton, and also unto my nephews and nieces Sarah Warraker, Sophiah Warraker, and John Warraker, children of my brother-in-law John Warraker, and also unto Ann Graham, William Graham, and Thomas Graham, children of my sister Ann Graham, five pounds apiece, within two years after he is in the possession of the said copyhold messuage or tenement and premises thereunto belonging, provided they are at their several ages of 21 years. But further my will and meaning is such, that in case my said nephew John Surry shall depart this life before he is in possession of the said copyhold messuage or tenement and premises, then I give will and devise the said copyhold messuage or tenement and premises as above-mentioned, unto my nephew John Warraker, son of my brother-in-law John Warraker, to have and to hold unto him and his heirs and assigns for ever. on condition of his paying the said legacies."

That the copyhold estate was surrendered to the use of the

will; and the testator died soon after making the will.

That Sarah Warraker, the widow, in 1784 married the defendant. That John Surry, one of the lessors of the plaintiff, is the devisee named in the will of the testator, and has not attained the age of 23 years.

That the lessors of the plaintiff George Bruton and John Surry are heirs at law of the testator William Warroker; and that the Dean and Chapter of Westminster are lords of the manor of Harpenden, of which the premises are holden.

The question for the opinion of the court is, whether the lessors of the plaintiff, or any of them, are entitled to reco-

ver in this action?

Lane, for the lessors of the plaintiff, contended that the estate, which was devised to Sarah Warraker, determined upon the marriage with her second husband; it being given to her on condition of her continuing a widow: and that it elther vested immediately in John Surry the nephew, or it descended to the heir at law till John Surry attained his age of 23 years.

1st, The widow's estate determined on the second marriage. It is a devise to the widow, provided she does not marry a

second

second husband; in case she does, then it goes over. In Brown and Cutter (a), where the testator devised to his wife, during her natural life, if she did not marry, but if she did, then that his son Humphry should presently after his mother's marriage enter, &c. the Court held it an estate during widowhood, and that it vested in Humphry to take effect in possession upon the marriage or death of the wife. In all the cases where it has been determined that the estate was to go over on the event of the widow's marriage, words similar to the present have been used.

Doe against FREEMAN.

And as it evidently was the testator's intention that the widow should forfeit her estate on marrying again, it is equally clear from the will that it was also his intention that his nephew John Surry should take immediately on the happening of that event; for he has positively given it to John Warraker in case John Surry died before that time. The testator could not intend that the widow, having forfeited the estate by marriage, should enjoy it in case John Surry lived till he attained his age of 23; for in the event of his death it is directed to go over immediately. John Surry must have a certain interest as to the duration of the widow's estate, that is durante viduitate: or the devise would involve a treble uncertainty, namely, during widowhood; till John Surry attained his age of 23; or till his death, not having attained that age. The first remainder-man is generally the greatest object of the testator's bounty; and it is to be presumed that the testator intended he should come into the possession of the estate sooner than the next remainder-man. But if a contrary construction be given to the will, if he live he must be postponed till he is 23 years of age, and if he die, the last is to take presently. At the time of making the will John Surry was two years old, and he is directed to pay legacies to several of the testator's nephews and nieces within two years after he comes into possession, provided they are at their several ages of 21 gears; such possession therefore cannot have been intended by the testator to be postponed till his age of 23, because the legatees must necessarily be more than 21, they being alive at the time of making the will. There are many cases in which it has been determined that the expressions when and then shall not postpone the estate. Munsfield and Dugard, 1 Eq. Cas. Abr. 195. Boraston's Case. 3 Co. 19 & 20. b. 1 P. Wms. 170. In Goodtitle and Whitby (b) where the testator devised Doe against

devised certain estates to trustees, in trust that they should lay out employ and bestow the rents and profits thereof for the maintenance, education, bringing up, and putting forth into the world, of T. and J. Hayward, sons of the testator's sister E. Huyward, during their minorities; and when and as they should respectively attain their ages of 21, then to the use and behoof of the said sons of his sister, the said T. and J. Hayward, and their heirs equally; Lord Mansfield said, "Where " an absolute property is given, and a particular interest gi-" ven in the mean time, as until the devisee shall come of age, " &c. and when he shall come of age, &c. then to him, &c. "the rule is, that that shall not operate as a condition prece-" dent, but as a description of the time when the remainder-" man is to take in possession. It is so plain upon the true " intent and meaning of this will, that it is a shame to cite " cases upon it. But yet I remember an apposite case in H. " 17 Geo. 2. in Canc. Tomkins v. Tomkins, where the devise " was " to his brother, in trust for his eldest son B. till he " should attain 21 years; and if he should die before 21, "then a devise over." The Court held the age of 21 to be no limitation of B.'s interest; but only a limitation of the trust during his minority, and that B. took the whole by implication. Here then the moment the widow married again, the estate vested in the remainder-man.

But if the Court should be of opinion that John Surry cannot take till 23, then he contended that it descended to the heir at law in the mean time. 1 Ro. Abr. 844. 2 Bac. Abr. 66. If this had been the case of a freehold, the remainders would all have been destroyed in the event of John Surry's not taking the estate, which the widow forfeited, before he attained his age of 23: but being copyhold, the lord of the manor has a sufficient freehold to support the remainders. Sty. 250. Bawsy v. Lowdall. Lit. s. 81. Com. Dig. Tit.

Copyhold. a. 2. Fearne 244. 2 Vern. 243,

As therefore the widow's estate determined on her second marriage, the remainder to John Surry takes effect immediately, or the lord of the manor is entitled to take as trustee for the heir at law; in either of which cases one of the lessors

of the plaintiff is entitled to recover.

Ashhurst, J. It is a settled principle that limitations in restraint of marriage are not to be favored. Wherever an estate is given to a widow for life, provided she shall not marry,

marry, unless there be a devise over immediately, it is merely in terrorem. In the present case there is a devise over: but that cannot be extended farther than the words of that devise, which are "to my nephew John Surry, when he shall attain FREEMAN.
his full age of 23 years." According to the true construction of the will, it is a devise to the wife during her widowhood, and for so much longer time as till the testator's nephew shall be 23 years of age.

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This is not like the case cited, where there was a devise to the wife during her widowhood, and upon her marriage a devise over to the son presently: those words are not like the

present, and therefore not applicable here.

Taking it not to vest till the nephew comes of age, there is no chasm to be supplied by interposing the heir at law; and the inconvenience of the estate being in abeyance in the interim is by those means prevented. And it seems to have been the testator's intention, that the widow should continue in possession till the nephew took it.

BULLER, J. The intention of the testator is extremely clear; if the widow did not marry, she was to enjoy the estate for her life; if she did marry, she was then only to have it till the nephew attained his age of 23, when he was to take it.

Let the Postea be delivered to the defendant.

DOE on the Demise of WARRY and Others against Monday, MILLER and Another, Executors of CHAMBERS. Nov. 15

I JECTMENT by the lessors of the plaintiff, who are A surrender the treasurer and antients of New-Inn, to recover a set in New-Ins of chambers in the Inn.

In February last, Richards who was tenant for life of the surer and chambers in question, agreed with J. Chambers for the sale antients of of his life estate: but there being a clause in Richards's grant made with that he should not sell or assign without the license of the their assent, treasurer and antients of the Inn, application was made to to the intent them for that purpose; who at a Pention held on the 23d of might grant

February the said chambers to

a purchaser. passes the estate to such purchaser before admission. Admission is not necessary, as in the case of copyholds, to complete the grantee's estate, but is only for the purpose of signifying the assent of the society that the grantee should become a member of the Inn.

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February 1786, ordered "that Richards should be at liberty " to surrender his chambers in favour of J. Chambers for his " life, the latter having agreed to take them for the purpose " of studying the law, and that He (J. Chambers) should be "admitted thereto upon the usual payment, and subject to the usual terms and conditions." In consequence of this, Richards executed a conveyance to J. Chambers, by which "he surrendered, granted, and yielded up the said chambers " &c. and all his estate, right, title, interest, and property "therein, to J. Warry, the treasurer and the rest of the an-"tients, to the end, intent, and purpose that the said trea-" surer and antients, or their successors, might grant the said " chambers and premises, according to the custom of the said " society, unto J' Chambers, one of the members of the said " society, and who had agreed to take the said chambers and " premises for and during the term of his natural life, at and " under such yearly rents, provisoes, conditions, and agree-" ments, as they should think fit." J. Chambers was to pay 201. vearly to the society by quarterly payments from the Christmas preceding. Immediately on the execution of the surrender he entered into possession, and continued there is till the 28th of March last, when he died. There being no meeting of the treasurer and antients between the time of the surrender by Richards and the death of Chambers, the admission of the latter was not made out by the society, neither did 7. Chambers pay the alienation fee of five guineas, which is due to the society on the transfer or sale of chambers. But it was proved at the trial that he might have had his admission if he had applied for it. The surrenders to the society by the tenants for life are always upon the usual stamps used for deeds; and the admissions are entered only in the society books without any stamp. On these facts the jury found a verdict for the lessors of the plaintiff.

Richardson, on a former day, had obtained a rule to shew cause why the verdict should not be set aside, and a new trial granted, on the ground that, wherever an estate passes by surrender and admission, the latter is absolutely necessary to perfect the conveyance of the estate. And he likened this to the case of copy holds, where admittance is necessary in order to vest the estate in the surrenderee. Co. Copyh. 70. If grantee enter before admittance, he is punishable as a trespasser; and if he surrender to the use of another it is void. Co. Copyh. 51. Telv. 44, 5. So where surrenderor or surrenderee and the two tenants into whose hands the surrender, it was made died before the presentment of the surrender, it was held

beld that the heir of the surrenderor might enter. Co. Copyh. 69. 3 Bulstr. 214. Cro. Fac. 403. Bridg. 52. Gilb. Ten. 263. In 2 Wils. 13, It was held that admittance is as necessary to a surrender, as inrollment to a bargain and sale, or livery to a feoffment. That though, by the case of Vaughan ex dem. Atkins v. Atkins (a), admission when granted, has relation back to the time of the surrender, yet in this case there having in fact been no admission, the estate continued in the surrenderor.

Doz against MILLES.

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Gibbs was to have shewn cause this day against the rule; but The Court, being of opinion that the cases relating to copyholds were not applicable to the present, delivered their opinions with any house have the following from

nions without hearing him, to the following effect.

ASHHURST, J. In whatever light this case is considered, the lessors of the plaintiff are entitled to recover. For if the surrender were not good so as to pass the estate to the surrenderee, the society are entitled to the possession of the chambers as against the defendants, because they were surrendered into their hands; and the defendants as executors of the surrenderee can have no color of right to them. But if the surrender were good, then the testator having only a life estate in them, they reverted of course to the society upon his death.

This cannot be considered as a copyhold or customary estate. For the surrender which is made to them upon every alienation is a mere form introduced for their own convenience, for the purpose of preventing improper persons from being admitted into the society. Immediately upon this surrender they became trustees for the testator. The equitable estate was vested by that act in him, and the legal estate in them.

BULLER, J. There is a manifest distinction between this case and that of copyholds. In the latter case there must be an admittance as well as a surrender, because admittance is necessary to pass the legal estate. But this is a bare trust. This is not a customary estate, but a freehold interest. New-Inn is a part of the Middle-Temple, which society are trustees for the Inn; and these latter are themselves merely trustees for the persons holding the chambers. As to the admittance which it has been contended is essential to the completion of a purchaser's title to chambers, that is only an assent on the part of the society that the particular person should become a member of

(a) 5 Burr. 2764.

1786. DOR againet MILLER. of it. For every person, on purchasing chambers, covenants that he will not assign without giving notice to the Inn of the person to whom he is about to assign, that they may either approve or disapprove of the intended purchaser; and that assent is written on unstamped paper and conveys no title: it is the surrender which passes the whole interest.

Rule discharged.

Monday. Nov. 13th. The KING against The Bishop of CHESTER.

A mandamus to a bishop to license a curate of an augmented curacy, where there was a cross cause the party had another remedy by quare imbedit. The next rule obtained for this purpose

without

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will be dis-

RULE had been obtained last Term, calling on the 1 defendant to shew cause why a mandamus should not issue, commanding him to license William Finch to preach in the chapel of St. Helen's, which is situated in the hamlet of Hardshaw, in the parish of Prescot, in the county of Lancaster.

It appeared that this chapel had been consecrated from time nomination, immemorial, and that the usual offices of the church had been refused; be-constantly performed therein. It also appeared to have been twice augmented by Queen Anne's bounty.

The present dispute concerning the nomination of a curate specific legal thereto arose upon the death of Peter Berry, clerk, the last incumbent, who died on the 28th of November 1785; at which time the right of appointing to the curacy was claimed by two several parties.

One of these were certain feoffees or trustees, in whom the chapel, chapel-vard, and other grounds belonging to the same, were stated to have been vested for many ages past, and who have been elected from time to time by each other. missed with also stated that a majority of such feoffees have constantly appointed a curate to officiate in the chapel, who has always received the profits thereof without any institution or induction from the ordinary: the trustees having held it as a donative before the augmentation. That since that time the curate so appointed by them has always applied for and had alicense from the ordinary to preach and officiate in the said chapel. That on the 26th of December 1785, W. Finch was nominated curate to the said chapel by a deed under the hands and seals of a majority of the feoffees, which was presented on the 6th of May following to the chancellor of the diocese of Chester, who was appointed in the absence of the bishop to grant licenses;

but that the chancellor, and the bishop, to whom a similar application was afterwards made, severally refused to grant such license.

The KING

The other claimant was Sumuel Sewell, vicar of the parish The Bishop of Prescot, who, by a deed under his hand and seal, dated the of Ches-31st of March 1786, appointed John Barnes to the said chapel, who, on the first of April in the same year, requested the chancellor of the diocese and the bishop to grant him a license, who severally declined it.

The feoffees and the vicar severally entered caveats in the

bishop's court against each other's claims.

In answer to the present application, it was sworn by the chancellor of the diocese of Chester that the said chapel had always been deemed and considered as subject to the ecclesiastical jurisdiction of the ordinary or bishop of the diocese. And as a ground for the court to refuse this application, is was stated that the said chapel, having been twice augmented by Queen Anne's bounty, is now considered by virtue of the statute 1 G. 1. st. 2. c. 10. as a perpetual cure and benefice, subject to lapse as a presentative living; and that the right of nomination thereunto is become grantable and recoverable. and the incumbency thereof liable to be determined by the like methods as the presentation to or incumbency in any vicarage And that, in consequence of the two abovementioned claims, the chapel having become litigious, the bishop had declined granting a license. That at the time when the above nominations were tendered to him as chancellor of the diocese, he informed the respective candidates, that in case due steps were not taken within the usual time to prevent it, the said curacy would lapse to the bishop or ordinary of the diocese.

Cowper and Law shewed cause against the rule. The question is, whether this curacy, having been twice augmented by Queen Anne's bounty, has not now all the qualities of a presentative benefice annexed to it? By 1 G. 1. c. 10. s. 6. it is enacted that in case such augmented cures be suffered to remain void for the space of six months, without any nomination of a fit person to serve the same, by the person having the right of nomination thereto, to the bisop or ordinary, to be licensed for that purpose, the same shall lapse to the bishop, &c. according to the course of law used in presentative benefices. Now the nomination required by the statute must be Vol. I. F f f such

wise it will not be sufficient to prevent the lapse. But in this instance the church being litigious, the bishop could not take against upon him to determine the claim of either party (a).

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Besides, the Court have uniformly laid it down as a rule never to grant a mandamus but where there is no other specific legal remedy. It was so said in the case of The King v. Blooer (b), which was recognized in The King v. Barker and Others (c); and in many other cases. It was refused in the case of The King against the Bank of England (d), because the party had another remedy, namely, by an action on the case. They also cited The King v. Dr. Askew and Others (e). Now the right of nomination to this chapel may be recovered in the same manner as a presentation to a vicarage presentative, by darrein presentment or quare impedit. The writ of quare impedit lay for chapels before the statute for the automentation of livings; for in the 13 Ed. 1. c. 5. c. 6. it is said that "from henceforth write of quare impedit shall be granted " for chapels, &c." In Mallory's quare impedit there are ma. ny cases mentioned where this remedy has lain for donatives (f). This curacy has always been subject to ecclesiastical jurisdiction; and therefore, independently of the statute of and mentation; which puts them upon the same footing with mensentative benefices, quare impedit would lie; it was so held. Milbank and Powel (g) by Lord Mansfield; who also that a mandamus would not lie where quare impedit didthe case of The King and bishop of Chester (h) a similar the tion was made on the part of the inhabitants of Troutbeck for a mandamus to compel the bishop to license a curate, which he had refused, because there was a contrary claim set up by the rector of the parish. But the Court refused the write because the parties had another remedy, namely, by quare impedit.

Hill, Serjeant, and Bearcroft, in support of the rule adapted that a mandamus was always granted where there was no other specific legal remedy, but denied the reverse of the granted in the court have granted a mandamus even though there was another remedy. As for instance, in the case of an office, for which a mandamus has frequently been granted although the party had another the case of the case of the party had another the case of the party had another the case of the case of the party had another the case of the case of the party had another the case of the c

<sup>(</sup>e) Vid. Watson's Incumb. tit. Lapse, 111. (b) 2 Burr. 1046. (c) 3 Burr. 1265. (d, Dougl. 506. (e) 4 Burr. 2186. (f) Vid. Co. Lit. 344 a. (g) Vid. post. 400. n. (b) E. 24 ©. 3. B. R.

of Sarum (a) where a mandamus was granted to admit the party to a canonry of Sarum, though it was strongly opposed, on the ground that it would be turning the common law remedy by quare impedit into another channel; the Court said, as to there being another remedy, the same might be said equally in cases where an assize, or an action upon the case, would try the right, and yet that was never thought a ground to deny the mandamus. Watson's Incumb. oct. 565. In the case of the King and Blooer (b) a mandamus was granted to restore a curate to a chapel which was a donative, and that case was afterwards recognized by Lord Mansfield in the King agains Barker and Another (c).

Those instances in which the Court have refused such an application as the present, because the party had another specific legal remedy, have been, where the mandamus, if granted, would necessarily have decided the question of right one way or the other. But that is not the case here; for if the bishop obey the writ, the title cannot be tried by this mandamus. All that is required is a license to preach. The object is mere public convenience, in order to put the person, in possession of this chapel, in a situation to perform the ecclesiastical duty without being subject to the penalties of the 36th canon. 12 Mod. 604. For however good the title of the party who makes this application may be, yet without a license he cannot maintain an action for money had and received against an usurper for the emoluments till in possession (d). There is no other specific legal remedy for a license besides a mandamus, unless it

(a) 2 Stra. 1082.

(b) 2 Burr. 1043.

(c) 3 Burr. 1265.

(d) 3 Wils. 355. This action was first brought in the court of King's Bench, where judgment was given for the defendant

where judgment was given for the defendant

Powel v. Milbeak. M. 12 G S B. R. This was an action for money had

and seceived brought by the plaintiff, as being entitled to the currey of Chester

Le Street, against the defendant who was in possession of the profits, and claim-

At the trial, the plaintiff set up a title under Mr. and Mrs. Jolife who had sominated thim to this living as a donative, and likewise under a nomination from the great seal, which was directed to the bishop in the usual form of presentations. As to the title under the crown, it was proved that this formerly belonged to the deaury of the collegiate church of Chester Le Street, and came to the crown on the dissolution of the monasteries, and continued in the hands of the crown till \$6 Jac. 1. when the deanry was granted away by the crown, excepting all advowsons, donations, dispositions, and rights of patronage to all churches, vicarages, chapels, &c. and also reserving the annual sum of 10t. to be paid to the curate for the time being. No nomination or presentation could be proved by the crown since the 16 Jac. 1. but two or three, and no more, were shewn by pessons claiming under the grant-

\* Vide. Gomp. 103.

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It

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be by appeal in the ecclesiastical court: and that has never been allowed as a sufficient reason for refusing a mandahus. Two

It was likewise proved that one of the curates had attended visitations of the bishop, though no instance was shewn of more than one curate attending them.

As to the title under the crown, Lord Manefeld said, that there was a sufficient ground to presume a grant of the advowson, &c. since the grant of the deanry; and directed the jury to find so, which they did. He laid it down as clear, that the curare having attended visitations in the manner stated was sufficient evidence of its being a perpetual cure, and not a donative; and he said if it were a donative, the form of the nomination under the great seal was wrong in being directed to the bishop; and that the form of that likewise shewed that it was thought to be a perpetual cure, and it was intended to be granted as such. Though it was said by the counsel in answer to this, that there was no other form, and this was the usual form for a donative; and that though it were directed to the bishop, yet that would make no difference as to the validity of it is passing a donative.

The plaintiff then entered on his title under Mr. and Mrs. Jolife, and proved the nomination under their seals; that he had taken the oaths of allegiance and supremacy before them; and that he produced his nomination to the bishop, and tendered himself to subscribe the articles, and make the declaration of conformity before him: but the bishop refused to suffer him to do it, because he had before licensed the defendant; and the plaintiff never was licensed by the bishop.

A case was reserved for the opinion of the court, stating the case that the plaintiff made under the nomination of Mr. and Mrs. Soliffe as before mentioned; and as to the title under the crown, the exception in the original grant was stated; that the persons claiming under that grant had enjoyed the nomination of appointment to this perpetual curacy, which the jury found to be sufficient to presume a grant from the crown. And the two questions stated for the opinion of the court were, 1st, If Mr. and Mrs. Soliffe had the right of nomination to this perpetual curacy. 2dly, If they had, wnether the plaintiff could recover the profits in this action?

The defects pretended in the plaintiff's title are first, that he Glynn, Serjeant. was not licensed by the bishop. 2dly, That he did not subscribe the articles and declaration of conformity. And the question is, if these be such defects as will prevent his recovering in this action. Much depends on the nature of the living. There are many instruments in nature of donations to this living, which are not directed part cularly to the bishop. The evidence relied upon to prove this not a donative was, that the curate had at times attended visitations, and thereby subjected himself to the jurisdiction of the bishop; but there is only one instance of any curate's doing it, and he came in by donation. This curacy is part of the possession of an ancient collegiate church, and during the time it was in their possession, the cure of souls, and divine service, were performed by the members of the collegiate church, or persons under their direction. There was then no establishment of a minister or permanent curate, but divine service was provided for by stipendiary curates. In the grant of Jac. 1. there is a stipulation and covenant to pay 10% a year to the minister, which is the original provision of a curate to this living, which was an original foundation; and consequently, this living is a donative. But, whether it be a donative or perpetual curacy, the plaintiff is entitled to recever.

The first objection is, that the plaintiff has not got a license; and admitting that it is not necessary in case of a donative, yet it is insisted, that it is in the case of a perpetual cure.

Lord Manifeld. The question of its being a donative was given up upon preducing the presentation of the crown; and there was exceedingly strong evidence to show that it had always been subject to the visitation of the bishop.

Glynn, Serjeant. But, if it be a cure, the want of a license is not a want of title. The nomination is the sole act that gives a title to the curate without any act of the bishop. As to licenses granted by the bishop there is no doubt but that

Two objections have been made to this application. 1st. That the augmentation has altered the nature of the curacy from a

donative The Kins against

of CHBS-

there must be a license from the bishop to authorise a person to preach, whether The Bishop he be a rector or a curate only, or have, or have not any other benefice; but there is no case which says there must be a license to preach on a particular cure, if the party have a general license before to preach. If a man preach without license, he is liable to the censures of the diocesan; but the benefice which he has is not avoided by that. The presentation of a layman is only a ground of deprivation, and till he is deprived, the person presented and inducted is entitled to the profits; and no person in answer to an action brought by him could say he was not capable: and even, if there were any canon that required such liceuse, yet that could not affect the party's legal right, but would only subject him to ecclesiastical

The second objection is that the plaintiff did not subscribe the thirty-nine articles, and read the declaration of conformity. The first is required by the statute of Eliz. but that statute comprehends only benefices with cure. This is not a benefice with cure, for a perpetual cure is not so; and it has always been so holden upon the question of pluralities. Institution and induction are the indicia (2 Keb. 556,) of benefices with cure of souls (a); and in the case of Powell v. Pearce before Dr. Hay, it was lately determined, that perpetual cures, which had received 2. Ann's bounty by the statute, became benefices with cure, because institution. &c, was then necessary, but before that it was never held so. But another answer to this objection is, that the not subscribing is not the plaintiff's fault; he tendered himself to the bishop who refused; therefore his not doing it was owing to the act of the bishop. There is no occasion here for a mandamue to put the

plaintiff in possession, because he is so already, and if so may maintain this action. Lord Manefield. The plaintiff cannot maintain an action for the profits till he is in possession. In curacies, the party is not in possession till license. We

must take this to be a curacy. Besides, it is a parish.

Impey. A license is required by canon, and that is recognized by stat. 12

Ann. c. 12.

Lord Mansfield. In this case, which is a perpetual curacy, there must be an admission. If a quare impedit lies, which I take it for granted it cloes for a free curacy, that is the proper remedy: But if not, a mandamus lies. If a quare impedit does lie, a mandamus does not.

Impey. There is a case in Stra. 1082, that a mandamus lies, though a quare

impedit does

Lord Manefield. Mr. J. Dennison always thought that case wrong: for no case is proper for a mandamus, but where there is no other specific remedy.

There is likewise a remedy in the ecclesiastical court, by what they call a duplex querela.

Lord Mansfield. I take it, that a license is absolutely necessary in the case of

a perpetual cure.

Impey. After arguing very fully to the other points. As to the license, the 48th canon, (Bu n's ecclesiastical law) requires it, and this is recognized by 12 Ann. et. 2. c. 12. and all the law books say, the examination of the ability of curates to serve cures is in the ecclesiastical judge, and if he have power to examine he may reject. 2 Inst. 631. It is said, this is not a benefice with cure, but in Burn and Gibson's Codex, it is laid down, that perpetual cures in general are be-nefices with cure. In Burn, tit. Dean and Chapter, there is a case where a mandamue was granted to admit. But then the bishop under this nomination was not compellable to do any of the acts required, because the plaintiff did not bring a proper nomination. A nomination to a perpetual cure is only a request to the bishop to admit.

Glynn, Serjeant in reply.

Lord Mansfield, Ch. J. I think this advowson of the same nature as advowsons of other livings. The principal point is upon the form. And it seems impossible The King against
The Bishop of Chis-

donative to a presentative benefice. 2dly, That, by the cross nominations and caveats entered, the church was become litigious. As to the first, it is sworn that this chapel is a donative, which has always been nominated to by certain feoffees, and that the curate in pursuance of such nomination has always been admitted without institution or induction, which in the case of a donative is not necessary, Cro. Jac. 63. It clearly was not the intention of the Legislature to change augmented donatives into presentative livings; if it had, it might easily have been expressed. On the contrary, the act has left them exactly as they were before augmentation, only subject to lapse and the bishop's visitation. Before the statute 1 G. 1. there could have been no lapse at all of a donative; and that statute only gives it conditionally, in case there is no nomination within six months. Now the party making this application has sworn that he was so nominated within six months after the death of the last incumbent; so that there cannot now be any lapse. Resides, supposing there had been no nomination by the feoffees within the six months, if there had been one at any time before this rule was obtained, it would have been sufficient to entitle the party to succeed in this application; for it is expressly provided by the 7th section, that if the person entitled to nominate suffer a lapse, but nominate before advantage is taken thereof, such a nomination will be good.

Secondly, as to the claim by the vicar; there is no foundation whatever for it. For supposing the right of the feoffees doubtful, at any rate the common law right would be in the rector and not in the vicar. But a presumption may arise from long usage against the clergy as well as against the crown. And here the feoffees are stated to have been in the exercise of this right for many ages past; therefore the court will presume it to have had a legal commencement.

In the case of The King against the bishop of London (a), the objection was that there was no salary. And the Court

possible to maintain this action against the defendant, who is completely in pussession. A license is never necessary, if this action can be maintained; and yea may as well bring an action for money had and received, where a man is not in possession, instead of an ejectment. Here this must be taken to be a cure of souls, for it is stated to be a parish; and in that case, it is expressly required that there should be a subscription.

Aston. Justice. This must be taken to be a benefice with cure, and then it is within the act of parliament, which says, that no person shall be admitted till he has first subscribed the articles; and there is a distinction between subscribing and reading the articles.

nd reading the articles.

Willes, J. and Asbburst J. ad idem.

Judgment for the defendant

(a) Ante, 331.

said, that had there been a fixed salary that would have been 1786. evidence of a custom, and then the rector could not have with held his pulpit. Here there is a custom expressly sworn to The King for the feoffees to nominate. Besides the entry of the careat The Bishop is no objection to the mandamus going. It it a proceeding in . Came the ecclesiastical court. In Stra. 893, 6. Fitzg. 194. a return to a mandamus that a suit was pending in the ecclesiastical court was held insufficient, and a peremptory mandamus was The case of the King and the bishop of Carliste (a) is precisely in point with this case, except as to the lapse. In the year 1752 and 1753, a dispute happened in the cathodral church of Carlisle about the dean's negative power in conferring benefices. Mr. Richardson was nominated by the chapter to the perpetual curacy of St. Cathbert's Carlinle. The dean entered a caveat, and the bishop refused to admit and hicense him. But the court of B. R. granted a munilamus to the bishop to admit and license the curate.

Ashhurst, J. It is not necessary for us to decide the point, whether a lapse can incur in this case; neither is there any question whether this court is bound in point of law to grant a mandamus: but the only question is, whether we will in our discretion grant it: and it seems to me that we are not bound to grant the writ. Then if we are not bound to do so, what reasons have been urged to induce us to grant it? We

will not unless we think the bishop has acted wrong.

As there were cross nominations, the bishop was not bound to decide which of the contending parties had the better wile: and if he did not take upon himself to decide that question, he might equally be bound to grant a license to both; in which come the parties would be contesting for the possession of the Therefore it was more fit and proper that he should withhold his license till the right was determined. Now, in the case of the King v. the bishop of Carhele, there was no cross nomination: the dean only claimed a negative. There is a distinction therefore between that and the present case. And it is not contended here but that either party has another remedy to enforce his right. In the case of a donative, the party is in full possession immediately on the nomination; and, if any other person takes the rents and profits, he may maintain an action for money had and received. And besides, each of them has a specific remedy by quare impedit; and this license would not forward him, to whom it is given, in the prosecution of such right. Therefore we are not bound to grant this mande-

(a) 2 Bern's Ecc. Law. 103.

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mus, but it is a matter of discretion; and there is no difference between this case and that of the King v. the Bishop of The King Chester.

**a**rainet

BULLER, J. The very ground on which this motion is The Bishop founded is that this curacy is a donative. And it is admitted that a quare impedit will lie; then if it will, the question is, whether this court will interpose by granting a mandamus.

In ancient cases the grounds on which this court has granted or refused a mandamus are not explicitly stated: but during the time Lord Mansfield has presided here, he has taken great pains to state particularly the grounds on which this court will either grant or refuse such writs. He has always said, this court will not interpose by granting a mandamus, unless the party making the application has no other specific legal remedy. It must be a legal and a specific remedy. Some cases have been mentioned at the bar, where the court granted a mandamus even though the party had another special legal remedy, such as an assize for office. But those offices have generally been such as are created by letters patent; and it is peculiarly the duty of this court to see that the powers created by the king's charters are properly exercised. Besides the court have said, in answer to those particular cases, that though the party had a remedy by assize, yet it is now obsolete, and therefore they have made an exception in those instances.

As to the King v. the bishop of Carlisle, it does not apply to the present case. For whatever might have been the fact, whether that living was augmented before the application to this court or not, it did not appear to the court that it had been augmented. Then it must be taken as a case where there was no augmentation; for de non apparentibus & de non existentibus eadem est ratio.

Then there is no case apposite, but that of the King v. the Bishop of Chester. That is the only one which has arisen since the statute of George the First; and there the court said, that, as the party had another specific legal remedy, they would not grant a mandamus. That determination is perfectly consistent with the rule uniformly laid down of late years.

It is true, as the counsel for the rule have said, that if the bishop were compelled to grant his license, it would enable the party licensed to maintain an action for money had and received to recover the profits of the curacy, which he would not perhaps otherwise do; but even if that were doubtful, it is no ground for the court to grant a mandamus, because the party has another remedy by cuare impedit.

Rule discharged (a).

<sup>(</sup>a) Vida R. v. The Marquis of Stafferd, poet 3. vol. 646.

The Court desired it to be understood that, as two different applications had been made for a mandamus to a Bishop without a good foundation, if a similar one were made in fu- The King ture on the same ground, they would discharge the rule with against

of CHES. TER.

BICKERDIKE and Another, Assignees of REICHARD a Tuesday, Bankrupt, against BOLLMAN. Nov. 14th.

TASE for money had and received to and for the use of A. a creditor the bankrupt, before his bankruptcy. 2d count, On an of B. to the account stated with the bankrupt. 3d, For money had and amount of received to and for the use of the plaintiffs as assignees. 4th, took his bill An account stated with the assignees. Plea non assumpsit, for 201. on This cause was tried at the last assizes for the county Pala- C who had not then,

tine of Lancaster before Buller, J. when the jury found a ver-nor afterdict for the plaintiffs, subject to the opinion of this Court on wards, any

the following case:

e following case:

That the act of bankruptcy was committed in the middle the bill of August 1784. That in the month of August 1784 the bank-when due rupt was indebted to Greatrix and Co. the petitioning credi-was dishotors, in 1151. 3s. 8d. That on the 15th of September 1784 no notice the bankrupt drew a bill for 20% on the defendant (a), " who thereof was "then until the time of the bankruptcy, and of the bill be given by A. "coming due, was a creditor of the bankrupt," payable to to B.; still Greatrix and Co. two months after date, and paid the same on the bill to them on account of their said debt; which bill was pre-was not dissented for payment on the 18th of November following, and charged; but dishonored. That no notice of the non-payment of the bill he may sue was ever given by Greatrix and Co. to the bankrupt, or left mission of at his house. That Greatrix and Co. received the bill at bankrupt Manchester on the 24th of November, between the hours of 11 against B. and 12 at noon; but the post goes from London to Manches- will support ter in three days. The bankrupt then resided at Manches-it. ter; but in general secreted himself, and particularly on market days, after the 20th of November, on which day a commission of bankrupt issued against him, and he was declared a bankrupt at Manchester under that commission in the afterneon of the 24th of November, but at what hour did not appear; and that commission has since been superseded. Af. Ggg

<sup>(</sup>a) The words between the inverted commas were added by the court, on the argument with the consent of both parties.

BICKER-DIKE against terwards another commission was issued on the petition of Greatrix and Co.

The question for the opinion of the Court is, whether the debt, proved to be due to them under the circumstances above mentioned, is sufficient to support that commission?

Chambre for the plaintiffs, (after observing that the objection which had been raised to the petitioning creditor's debt, was, that the bankrupt was to be considered as discharged from the bill for 20% which he had drawn in favour of the petitioning creditor, no notice having been given to the bankrupt of the bill's having been dishonored,) made three questions:

1st, That no notice was necessary to be given to the bankrupt in this case. 2dly, That even if notice were necessary, it had virtually been given. 3dly, That it was not competent to the defendant in this action to make the objection.

As to the first, notice must in general be given: but most of the cases have arisen where the holder has given indulgence to the acceptor, by which he is considered as having made his election, to look to the acceptor only for payment. son on which the rule, requiring notice to be given to the drawer, is founded, is on a supposition that he may have effects in the hands of the drawee, and that he ought to have an opportunity of recovering satisfaction from him. presumption arises, that the drawer will suffer from the probable insolvency of the drawee, in consequence of the holder's neglecting to give notice. But in this case that presumption is repelled by stating that the bankrupt was a debtor to the drawee; therefore the rule does not apply. By an ordinance of France (a) the drawer, in order to discharge himself from the payment of a bill on account of his not having had notice of the non-acceptance by the drawee, must shew that he had effects in the other's hands at the time of drawing. The rule requiring notice to be given to the drawer was introduced for his protection, and therefore ought not to be abused so far as to enable him to do injustice.

Secondly, As this case does not fall within the reason on which the rule of law is founded, the bankrupt, not having had effects in the hands of the drawee at the time that the bill was drawn, must be considered as having had virtual notice that the bill was not honored. Supposing however that the rule of law would be inflexible in an action on the bill itself, yet the question here is not altogether whether the drawer can

(a) Postlethw. tit. Bills of Exchange, 16 and 17 art.

be resorted to on the bill, but whether the circumstances here stated extinguish the preceding debt. But it has been repeatedly held that the mere drawing of a bill of exchange does not extinguish the preceding debt.

B: CKER-DIKE against

Thirdly, the case of Quantock and Others against England (a) is decisive. On a question whether a debt barred by the statute of limitations was sufficient to found a commission of bankrupt upon, Lord Mansfield said, "The statute of limitations does not destroy the debt, it only takes away the remedy. Here the debtor himself has not objected; he has submitted to the commission, and been examined under it; therefore the objection does not now lie in the mouth of a "third person;" and he said that Swain and Wallinger (b) was in point. In this case the notice to be given was for the benefit of the bankrupt, and the slightest acknowledgment would be considered as a waver of it.

BULLER, J. The bankrupt himself could not wave it after the bankruptcy.

Chambre. But the assignees may wave it for the purpose of supporting the commission.

Law, contra. The debt of the petitioning creditor being reduced under 1001. by the bankrupt's drawing the bill in question, is as much discharged by the laches of the holder in not giving notice of the non-acceptance of the drawee, as by actual payment. And as to the assignees waiving this objection, it is no answer in the present action. For in all cases where actions are brought by the assignees of a bankrupt, they must make out a clear title, which they cannot do without proving a legal debt of the petitioning creditor; and they cannot by their own act make that a good debt which would not be so otherwise.

As to notice not having been necessary because the drawer had no effects in the drawee's hands, that goes to measuring the inconvenience which would result in every particular case from not giving notice. But the Court have always said that, whether any actual change of circumstance has or has not taken place, or whether the drawer may or may not have suffered from the negligence of the holder in not having given notice in due time, it is a strict rule of law introduced for the sake of certainty, and that the drawer may have an opportunity of resorting to the drawee. In the case of *Peach* and *Burgess* (c), where a question arose upon the necessity of notice being given to the drawer, it was contended that no

<sup>(</sup>a) 5 Burr. 2628. 2 Black. Rep. 702. 8. C. (b) 2 Stra. 746. (c) Sittings at Guildball, cor. Lord Manefield.

BICKER-DIKE against BOLLMAN.

change of circumstances had taken place, or probable inconvenience had ensued, from want of notice; but Lord Mansfield said, it was a strict rule of law that notice should be given, and it must be adhered to in every case. This case does not come within the rules laid down in the cases of Tindal and Brown (a), or Medcalf and Hall (b), as to what shall be deemed sufficient notice of non-payment or non-acceptance; because here there was no notice at all. It was said by Lee, in arguing the case of Russell and Langstaff? (c), and not denied by the Court, that it had been frequently ruled by Lord Mansfield at Guildhall, that it is not an excuse for not demanding payment on a note or bill, or for not giving notice of non-payment, that the maker or acceptor has become a bankrupt, as many ways may remain of obtaining payment by the assistance of friends or otherwise.

The bill's having been given after the act of bankruptcy does not vary the present case; because a debt may be discharged in due course of trade, either by payment of the money after a secret act of bankruptcy, or by payment of the

bill, or by dishonoring it.

With regard to the debt's being extinguished by taking this note from the bankrupt; by 3 and 4 Ann. c. 9. s. 7. it is enacted, that "if any person accept a bill of exchange for 20% or upwards, in satisfaction of any former debt, the same "shall be accounted a full and complete payment of such debt, if such person accepting of any such bill for his debt doth not take his due course to obtain payment thereof, by "endeavouring to get the same accepted and paid, and make his protest as aforesaid, either for non-acceptance or non-"payment thereof." Here there was neither protest nor notice, and therefore the bill must be considered as complete payment.

Chambre, in reply, was stopped by the Court.

ASHHURST, J. As to the general rule; it has never been disputed, that the want of notice to the drawer after the dishonor of a bill is tantamount to payment by him; but that rule is not without exceptions; and particularly in the case mentioned by the plaintiff's counsel, that notice is not necessary to be given where the drawer has no effects in the hands of the drawee (d); for it is a fraud in itself, and if that can be proved, the notice may be dispensed with. In this case it appears, that at the time of drawing the bill, the drawer, so

<sup>(</sup>a) Ante, 167. (b) 27. 22 G. 3. (c) Dougl. 497. (d) Vid. Gale v. Walsh, post. 5 vol. 239.

far from having any effects in the hands of the drawee, was

actually indebted to him to a large amount.

But even admitting this to be a general rule without any exception; it was certainly introduced for the benefit of the drawer. Now every rule may be waived by the person for BOLLMAN. whose benefit it is introduced. Under the circumstances of the present case the drawer must be considered as having waived this benefit, because the commission is founded on that creditor's debt, between whom and the drawer this trans. action has happened; and his submitting to it is a waiver of the want of notice, and an admission of the debt; which admission the assignees have subsequently confirmed by bring-Therefore I think that as the bankrupt himing this action. self has not chosen to take advantage of it by moving to supersede the commission, it does not now lie in the mouth of a third person to do so.

BULLER, J. The last point may be laid entirely out of the case, because, unless the objection be well founded in the case of the bankrupt himself, it is immaterial to consider how far it was competent for a third person to take advantage of it. The case of Quantock and England does not apply. There the question was, whether a third person should be permitted to avail himself of the statute of limitations. There might be good reasons for disallowing it in that case, because the debt still remained in conscience. But here the question is, whether there was a sufficient debt to support the commission

at the time when it issued.

The first point to be considered is, whether under these circumstances it was necessary to give notice within as short a time as could conveniently be done, that the bill was neither accepted nor paid. I am of opinion that no such notice was necessary. On the second trial of the cause of Tindal and Brown before me at Guildhall, the jury told me they found their verdict for the plaintiff on the ground that it had not appeared from the evidence that any injury had arisen to the party from want of notice. In consequence of which, upon the subsequent trial, I told the jury that where a bill was accepted, it was prima facie evidence that there were effects of the drawer in the hands of the acceptor. The mistake of the jury on the former occasion had arisen from their taking it for granted that the drawer had not been injured by the want of notice, because he had not proved it, whereas that proof lay on the plaintiff to produce. And upon my mentioning this matter to the Court, they thought that if there were no effects

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in the hands of the acceptor, that would vary the question very much, as the drawer could not be hurt.

The law requires notice to be given for this reason, because it is presumed that the bill is drawn on account of the BOLLMAN. drawee's having effects of the drawer in his hands: and if the latter has notice that the bill is not accepted, or not paid, he may withdraw them immediately. But if he has no effects in the other's hands, then he cannot be injured for want of notice. Soon after I sat on this bench, I tried a cause at Guildhall, on a bill of exchange which was either drawn or accepted by a person residing in Holland, and a full special jury. under my direction, found a verdict for the plaintiff, notwithstanding no notice had been given to the drawer of the bill's having been dishonored, because he had no effects in the hands of the person on whom the bill was drawn. That verdict never was objected to: and if it be proved on the part of the plaintiff, that from the time the bill was drawn, till the time it became due, the drawer never had any effects of the drawee in his hands, I think notice to the drawer is not necessary; for he must know whether he had effects in the hands of the drawee or not; and if he had none, he had no right to draw upon him, and to expect payment from him; nor can he be injured by the non-payment of the bill, or the want of notice that it has been dishonored. On these grounds I think the petitioning creditor's debt was sufficient to support the commission.

Besides, in the present case, as the plaintiff's counsel have truly argued, the question is not, whether an action could be maintained on the bill itself, but whether the want of notice extinguishes the debt. As to which the case is this. A. not having any effects in C.'s hands, draws a bill of exchange for 1001. on him, in favour of B. for value received. Now if C. does not accept, and B. does not give notice to A. there is an end of the bill. Then how does the case stand? A. has 100% of B.'s in his hands, without any consideration, which therefore B. may undoubtedly recover in an action for money had and received.

Per Curiam.

Let the *Postea* be delivered to the plaintiffs.

1786.

#### HOLDFAST, on the Demise of COWPER, against MARTEN and Another.

Tuesday. Nov. 14th.

HIS was an ejectment tried at the last assizes at Reading, Where the before Eyre, Baron, when a verdict was found for the testator lessor of the plaintiff, subject to the opinion of the court of bequeath-King's Bench, on the following case:

ng's Bench, on the following case:

Thomas Spooner, being seized in fee of the premises in ques-" bis entate
" at B." and tion, consisting of an house, barn, and about 59 acres of land, "the rest of situate at Braywick, in the county of Berks, by his will, bear- "his effects, ing date the 17th of August 1775, devised the same in the words "furniture, following: "I give and bequeath to Mrs. Marten, daughter "real and "of my late uncle, Dr. Benjamin, my estate at Braywick, personal, "Berks." And after giving several legacies, the will pro- " to C." A. ceeded thus: " After these legacies I give and bequeath all took the es-"the rest of my effects, furniture, estates real and personal, fee. The " or all the rest that I may have and leave at the time of my word "es-"blessed departure, to my nephew, Mr. Joseph Cowper." tate" of it-The same Mr. Joseph Cowper is appointed one of the execuse fee (a); and tors of the will, and is the lessor of the plaintiff.

The testator had a small freehold estate, which is not men-straint must tioned in his will. He died in November 1780. On his death, be added to Mrs. Ann Garden (called Marten in the will by mistake) en-ry a less estered on the estate in question, and held the same till her tate. death, which happened in 1783. On the death of Mrs. Garden, Elizabeth Fletcher her heir at law entered upon the premises and held them till her death, which happened in the same year 1783. Elizabeth Fletcher died without issue. The

defendants are her co-heirs at law.

The question reserved for the opinion of the Court is, Whether the lessor of the plaintiff is entitled to recover?

Plumer for the lessor of the plaintiff. If an estate for life only were given to Mrs. Marten, the remainder was carried over to the lessor of the plaintiff by the general residuary devise; for whatever was not before disposed of by the will passed by that clause to him.

But under the devise to Mrs. Marten an estate for life only passed. As there are no words of limitation or perpetuity, it cannot be inferred that the testator meant to convey more than

<sup>(</sup>a) So will the word "estates." Vid. post. 2 vol. 656, & 659. n. b.

1786. againet MARTEN.

an estate for life to her. The words are " I give to Mrs. Marten my estate at Braywick." Now it is a settled rule, HOLDFAST that an estate given generally is only an estate for life. this construction holds as well in wills as in deeds: the only difference is that in a deed a certain form of words must be used in order to convey a fee: but in the latter no particular form of words is necessary; it being sufficient if the words used by the testator plainly indicate an intention to give more than an estate for life. But in the present case no such intention can be collected from the words of this devise. In Loveacre ex dem. Mudge v. Blight and wife (a), Lord Mansfield said, " If the Court cannot find words in the will sufficient to " carry a fee, though they should themselves be satisfied be-"yound the possibility of a doubt, as to what the intention of "the party was, they must adhere to the rule of law." Then the question here is, are there any words or circumstances in this will to vary the effect of this devise to Mrs. Marten? It is incumbent on the other party to point out that in order to enlarge the estate. The only words, from which it can be supposed that the testator meant to devise more than an estate for life, are those which he has used in speaking of the thing given, namely, my estate at Braywick." But the word es-"tate," there being words of locality annexed to it, is a description of the thing only, and not of the interest in the estate. The word "estate" being an equivocal expression, may either mean the thing itself, or the interest of the party in it, or both. Now here is nothing to shew that, in this particular case, it means the interest; for, first, there are words of locality annexed to it: in common acceptation the word means the land itself; it is only in technical language that it means the interest. In the next place as to the general context of the will, there are no circumstances here explanatory of the tes. tator's intention to give Mrs. Marten more than an estate for life; for he was then giving an estate to a married woman. And the principal object of his bounty was his nephew, to whom he gave the bulk of his property. Nor lastly is it necessary, in order to dispose of all the testator's property under the will, that this should be construed to be a devise of the fee; for the residuary clause will carry it over. There is neither an introductory clause, nor any general clause in the body of the will, indicating the testator's intention to dispose of all his property, which, when coupled with the devise to Mrs. Marten, can convert this into an estate in fee.

In

against

In Chester v. Painter (a), and Frogmorton dem. Wright v. Wright and Another (b), the word "estate" was construed to mean the thing, and not the interest, even though in both HILDPAST those cases the word "all" was prefixed. In Hogan v. Jackson (c), Lord Mansfield, after taking the distinction between the land and the quantity of interest in the land, said, " if there " are no words of limitation added, it only passes an estate " for life." And afterwards in the same case he said, "it is " now clearly settled that the words ' all his estate' will pass "every thing a man has: but if the word 'all' be coupled "with the word 'personal' or a local description, there, the " gift will pass only personalty, or the specific estate particu" larly described."

He admitted that there were many cases where the word " estate" has been held to pass a fee; but it was in one of other of these instances: 1st, Where there was an introducto. ry clause indicating an intention in the testator to dispose of all his estate, which bore on the particular clause in which the specific devise was contained; as where the testator said, "Imean to dispose of all my estate: but even there the word "all" is the operative word, and not the word "estate". For "all" when coupled with other words than "estate" has been held to pass a fee: as "all I am worth" in Huxtep v. Brooman (d). 2dly, Where the testator has directed something to be done, which required more than an estate for life to carry the testator's intention into execution, as to pay debts, legacies, &c.

But none of those cases are applicable to the present, because here is no general introductory clause, or any thing to be done by the devisee which renders it necessary to enlarge the estate for life. Therefore as the word "estate" in this devise is descriptive of the locality, and not of the quantum of interest; as the word "all" is not added; and as the context will not warrant a greater estate than for life; the Court will not sonstrue this into a devise of the fee.

Abbot, for the defendant, was stopped by the Court.

ASHHURST, J. There can be no doubt of the testator's intention in this case: if the intermediate words between the two devises be omitted, the will runs thus; " I give and be-" queath to Mrs. Marten my estate at Braywick, and the rest " I give to my nephew."

H h h BULLER, Vol. I.

<sup>(</sup>a) 2 P. Wms. 335. 2 Eq. Coo. Abr. 318. (b) 3 Wile. 414. (J) Brown's Cha. Cas. 437. (c) Comp. 306.

MARTEN.

BULLER, J. The word estate is the most general word that can be used. For so far from its being necessary to add HOLDFAST words of inheritance in order to make it pass a fee, words of restraint must be added in order to carry a less estate: for it is genus generalissimum. If the word "estate" in the residuary clause carries a fee to the nephew, it must also have the same effect in the first devise. The intention of the devisor is clear: he meant to give his whole estate in Braywick to Mrs. Marten, and the rest to his nephew Cowper. The word " estate" was much commented upon by Holt, Ch. J. in the countess of Bridgewater's case (a).

The case of Chester v. Painter is likewise an authority for this determination. There it appeared that the testator knew how to give an estate in fee, for he gave an estate to his son and his heirs: but where he wished to give only an estate for life, he omitted the word "heirs." Now apply that to the present case: in another part of this will (which does not form a part of this case) the testator gave an estate for life in express words; which shews that if he had intended to have given only an estate for life to Mrs. Marten, he would have added the same words in the devise to her.

Per Cur. Let the Postea be delivered to the Defendant.

(a) 6 Mod. 106. Salk. 236.

Tuesday, Nov. 14th.

# PROSER against HYDE.

An appeal against a conviction on the 24 ing horses, ter sessions

BOUTION.

A action

on the case cannot be

CASE against the defendant as justice of the peace, (before whom the plaintiff had been convicted on 24 Geo. 3. c. 31.) for refusing to take good and sufficient security in order Geo. 3 c. 31. that the plaintiff might appeal to the then next general quarter for not enter- sessions of the peace against the said conviction. The second Le must be count was for not returning the said conviction to the next geto the quar- neral quarter sessions (after notice,) by means whereof the plaintiff was prevented from prosecuting his said appeal before the consicti. the justices of the peace at the then next general quarter seson, and not sions, who refused to receive and hear the said appeal for after the ex-want of the said conviction being returned.

The defendant pleaded the general issue.

This

maintained against a justice of the peace for refusing to take bail in order that the party may appeal to any other sessions than those next after the conviction; nor for not returning the conviction to any other sessions.

1786.

P ...ER

HYDE.

This cause was tried at the sittings at Westminster after last Trinity Term before Buller, J. when the jury found a verdict for the plaintiff, damages 100L costs 40s, subject to the opinion of this Court on the following case; which stated,

That the plaintiff, on the 23d June 1785, was convicted before the defendant for keeping a horse without paying the duty, the plaintiff being present at the time of such conviction.

That on 23d July following, the constable took possession of the plaintiff's goods and sold them. That no warrant was produced on the trial of this cause, but that on the 25th of July the defendant said that the constable was in possession under his warrant.

That the quarter sessions next after the conviction was holden on the 27th of June. And that on the 25th of July the plaintiff offered two sufficient sureties to the defendant for prosecuting an appeal against the said conviction, and gave him notice of his intention to appeal: but the defendant refused to take any bail.

That the next quarter sessions after the 23d of July was holden in October 1785.

That the following notice was given by the plaintiff's attorney to the defendant on the 19th of November 1785: "Take notice that I shall in one month from the date hereof commence an action against you at the suit of Thomas Proser of &c. for having on the 20th day of July last illegally granted a warrant against the said Thomas Proser, addressed to all constables and others his majesty's officers of the peace in and for the said county, especially to William Brooks constable, whereby they were commanded to levy the sum of 201. and 11. 18s. costs of suit by distress on the goods of the said Thomas Proser, and that they should cause sale to be made thereof in case they should not be redeemed within six days after the same should be taken by them, for having on 29th of May 1785, (he the said Thomas Proser so living in Tottenham Court Road, and being within the weekly bills of mortality,) kept and used one gelding for the purpose of drawing a certain carriage; and the said Thomas Proser did not within ten days after beginning to keep and use the said gelding for that purpose aforesaid give notice in writing at the office in London for stamping and making vellum, parchment, and paper, of his keeping and using the same, and of the parish and place where he resided, and pay down the duty of ten shillings imposed

on. iion was 1786.
PROSER
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Hyps.

by the statute for keeping and using the said gelding, according to the directions of the said statute; and for having caused the goods of the said Thomas Proser to be sold by auction, within less time than allowed after the same were taken by an inventory contrary to the directions of the said statute; and also for having, previous to the said goods being sold, refused to accept security or securities for the said Thomas Proser's prosecuting his appeal on your conviction, at the last general quarter sessions of the peace held for the county of Middlesex; and also for not returning and delivering the order and conviction thereon into the court of general quarter sessions of the peace, held at the sessions house on Clerkenwell-Green, in and for the said county of Middlesex on Monday the 17th day of October last, as required by the act of parliament in that case made and provided, whereby the said Thomas Proser was prevented from prosecuting his said appeal.

That no conviction was returned by the said defendant to either of the said sessions. And parol evidence of what passed before the justice at the time of the conviction was reject-

ed upon the trial of the cause.

The question for the opinion of the Court is, Whether the

plaintiff is entitled to recover in this action?

Wood, for the plaintiff. The principal objection to this action is, that by the statute 24 Geo. 3. c. 31. s. 19. it is provided, that the appeal shall be to the next quarter sessions: and it was contended at the trial, that the plaintiff ought to have appealed to the quarter sessions next after the conviction, which were held on the 27th of June; and therefore as he could not prosecute the appeal at the time of making the application to the defendant, this action could not be maintained.

But the plaintiff was entitled to appeal to the quarter sessions next after the time when he found himself aggrieved: and he was not aggrieved till the execution was carried into effect, which was not till the 23d of July: and although the plaintiff had notice of the conviction at the time, yet he could not be said to be aggrieved thereby; for the conviction might not perhaps have been enforced, or might have been afterwards

quashed.

By the 13 & 14 Car. 2. c. 12. s. 2. there is a proviso, that any person who finds himself aggrieved by the judgment of two justices, (relative to orders for the removal of paupers,) may appeal to the next quarter sessions. But the construction of that statute has always been, that the appeal may be to the quarter sessions next after the person finds himself aggrieved,

1786.

Proses againes

HYDE.

and not to the sessions next after the order of removal. Rex v. Inhabitants of Norton (u). The proviso in this act is of a similar nature. In that case the party is not aggrieved till the removal; in the present, not till the execution.

The next objection was to the form of the notice: but it is sufficient if it contain the substance of the cause of action; which is done by the notice given to the defendant in the pre-

sent action.

Next as to the rejection of the parol evidence: It was very properly rejected; for no evidence of what passed at the time of the conviction ought to have been received at the trial, except such as was stated on the conviction itself.

Silvester, contra, was stopped by the Court.

ASHHURST, J. The words of the act are decisive; for it says "If any person shall find himself aggrieved by the judg-"ment of any such justice, &c. he may appeal to the justices at the next general quarter sessions." Therefore the plaintiff should have appealed to the sessions next after the judgment.

BULLER, J. The cases relative to appeals against orders of removal are very distinguishable from the present. All orders of removal are ex parte proceedings; and the other party cannot know any thing of them till the actual removal. But this conviction is more like a judgment of this court, than an order of removal. The grievance to the party is the judgment, and not the execution. A writ of error will lie before execution: and an appeal is in the nature of a writ of error: It complains of the judgment.

If a contrary construction were to be put upon this statute, it would be such a snare to the magistrates, that they would never be safe. For the justices do not issue their warrants of execution till they know whether an appeal will be brought or not; and they could never know when the party found himself aggrieved, if he were not to appeal at the quarter sessi-

ons next after the conviction.

Let the Postea be delivered to the defendant.

(a) 2 Stra. 831.

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Tuesday,
Nov. 14th.

#### ROGERS against REEVES.

THE declaration stated that before the making of the promise and undertaking after manifold. An agreement in wrimise and undertaking after mentioned, to wit, in Miting to put in good bail chaelmas Term in the 23d year, &c. one John Torriano sued for a person out a latitat directed to the then sheriff of Surry, commanding arrested on him to take one Richard Stephens and him safely keep so that meane prohe might have his body before, &c. on Thursday next after cess at the return of the eight days of St. Hilary then next, to answer to the said John writ, or sur- Torriano in a plea of trespass, and also to a bill of the said J. render the Torriano against the said Richard Stephens for 401. upon pro-body, or pay mises, &c. which writ was indorsed for hail for 351 70 and render the mises, &c. which writ was indorsed for bail for 35l. 7s. and debt and costs, made was delivered to Sir A. Pitches knight then sheriff to be exeby a third cuted, who made out his warrant thereon to the plaintiff as person with his bailiff; by virtue whereof the plaintiff being his bailiff the bailiff of the she- took and arrested the said Richard Stephens; and the said riff, in con-Richard Stephens being in the custody of the plaintiff as such sideration of bailiff, in consideration that the said plaintiff, at the special his discharinstance and request of the defendant, would permit the said ging the party arrest- Richard Stephens to go at large out of the custody of the plained, is void tiff, from the said arrest, the said defendant undertook and by stat. 23 promised the plaintiff to put in good bail for the said Richard H. 6. c. 9. The under. Stephens in the said suit on or before the return of the said taking of an writ, or surrender the body of the said Richard Stephens to attorney for the plaintiff, or in default thereof to pay the debt and costs in the appearance of a de. the said suit. That the plaintiff, confiding in the promise and undertaking of the said defendant, suffered and permitted the fendant is said Richard Stephens to go at large; yet that the said defendant did not put in any bail whatsoever for the said Richard because it is given to the Stephens in the said suit at or before the return of the said writ, or at any other time whatsoever, or surrender the body plaintiff in the action of the said Richard Stephens to the plaintiff, or pay the debt and not to and costs in the said suit or any part thereof, and that for want the sheriff. of bail being put in to the said suit, a writ of attachment issued against the said Sir A. Pitches, whereupon the plaintiff, in order to prevent the said Sir A. Pitches from being taken and arrested, and likewise to prevent himself, the plaintiff, from being sued at law by the said sheriff of Surry, for breach of his duty, as such bailiff, in suffering the said Richard Stephens to go at large, was obliged to pay and did pay to the said J. Torriano his debt due to him from the said Richard Stephens. Second

1786.

Rocens against

REEVES.

Second count for money paid, laid out and expended. Third count for money had and received. Plea non assumpsit.

This cause was tried before Buller, J. at the Sittings after Trinity Term, 1785, when a verdict was found for the plaintiff, damages 44l. subject to the opinion of the court on the following case;

That Richard Stephens was arrested by the plaintiff by virtue of a latitat, and a warrant thereon granted against him, at the suit of J. Torriano, and was discharged by the plaintiff on the following undertaking of the defendant.

"In the King's Bench. J. Torriano, gent. against Rich." ard Stephens. Returnable on Thursday next, after eight days of St. Hilary. Damages 40l. bail for 35l. 7s. Theak. stone by Evans, attorney; I do hereby undertake to put in good bail on or before the return, or surrender the body to Mr. S. Rogers, one of the officers to the sheriff of Surry, or on default pay debt and costs. Dated 24th December,

" 1782.

S. Reeves."

That the plaintiff has since been compelled to pay to the said J. Torriano 441. for debt and costs, by virtue of an attachment issued against the sheriff.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover in this action on any of the counts in the declaration?

Shepherd, for the plaintiff, contended that this undertaking was not void at common law. And that in order to render it illegal, it must come within the statute 23 H. 6. c. 9.

All obligations and contracts with a sheriff are good, if not for a breach of duty, or contrary to the statute of 23 H. 6. Many cases have decided that undertakings by a party to a sheriff, indemnifying him for not executing process as he is commanded, are valid in law. Burgoyne v. Kerry, Anders. 267. Beawfage's case. 10 Co. 101. Dabridgecourt v. Smalbroke, Cro. Eliz. 178. Sir G. Reynell's case. Poph. 165. Moor. 542. Saund. 161. All these prove that obligations of indemnity at common law were good, and consequently continue so, unless precisely within the statute of 23 H. 6. A simple contract is the same under the statute as a bond. Cro. Eliz. 178. 199. And if this undertaking complies with the substance of the statute, it is the same as if it were the case of a bond. If not, it is not within the statute at all, and then it stands good at common law. In Dive v. Manningham,

Rogers against Regues.

Ch. J. Montague said (a) it was lawful to let the party to bail who is in custody on mesne process; and the statute directing the sheriff to let them to bail was made in affirmance of the common law: This undertaking on letting the defendant to bail was not therefore contrary to his duty, nor illegal.

The general clause of the statute does not attach on any obligation to which the former one does not extend; and the former one speaks only of obligations by persons in ward. In 10 Co. 100. a. and Moor. 542. it is said "the latter words, though general, extend only to the precedent branch, namely,

bonds taken of those who are in their ward."

This undertaking does substantially comply with the sta-It is not necessary that the indemnity should be given to the sheriff himself; for the statute mentions bailiffs as well as sheriffs. This therefore is warranted by the act. He admitted that many authorities had determined bonds to be illegal, because not given to the sheriff by his name of office, but none of them declared an indemnity to a sheriff's officer to be illegal. This contract is not within the mischief intended to be remedied by the statute. The mischief was the extortion of the sheriff, who, under his discretionary power of letting to bail, oppressed the defendant. It put a defendant in custody under legal process in the same situation with respect to sareties given to the sheriff, unless in the prescribed form, with persons who are under duress. It therefore prescribed the form under which he is compellable to release him; and, to prevent any operation on the fears of the defendant while in custody, made all engagements in any other form void. But the mischief does not exist with respect to persons not in ward; who, though they may claim the right of giving security to the sheriff or his officers in the form prescribed by the statute, may yet enter into any contract which was legal before the statute, and is not prohibited by it.

This indemnity is the same as that prescribed by the statute; for an undertaking that the defendant shall appear at the return of the writ, is in effect an undertaking to put in bail. Harrison and Others v. Davies and Others. 5 Burr. 2683. If it be objected that the remaining part of this indemnity, namely, an undertaking to surrender the defendant or to pay the debt and cost, is not warranted by the statute, it is sufficient in answer to say, that it is materially connected with the former part, and is consistent with the purposes of the statute.

(a) Plowd. 67.

tute. And where bonds have been set aside, because they were conditioned for something more than the appearance of the defendant at the return of the writ, it has been because that other act was distinct from and independent of the act of appearing. But this undertaking can be applied to no other purpose whatsoever; and under it no extortion can be committed.

Rocess
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Resyes.

But supposing this undertaking not within the act, because not given to the proper person and on the strict condition prescribed by the act, still it is not given by the person described by the act, and therefore not within it; for the statute does not extend to third persons. Moor. 542. Sid. 132. And this kind of indemnity receives a sanction from the practice of the court, in the instance of their compelling attornies to put in bail, or pay the debt according to their engagement. It cannot be contended that this rule holds only with respect to attornies; because the court has never considered such an undertaking contrary to the statute, otherwise they would not have compelled attornies to carry into execution contracts expressly prohibited by act of parliament. As to the circumstance of their being officers of the court; that might with equal propriety be urged as a reason for obliging them to perform an usurious or any other illegal contract. reason therefore, why the court will enforce a performance of such engagements by attornies, is because they are made by third persons.

Couper for the defendant. This is different from the case of attornies. The undertakings entered into by them, and enforced by the court, are not by way of indemnifying the sheriff, but to make satisfaction to the party suing. But in the case of a third person, who is not amenable to the summary process of the court, they will not compel a performance of such an undertaking by him, as they would if it were given by an officer of the court. He was then stopped by the Court.

ASHHURST, J. The statute in this case having prescribed the form of security, and having declared that all others shall be void, the security must be in that particular form marked out by the statute. The constant usage since the passing of the act of the 23 H.6. has been to take security by bond: but this is only a simple contract, and not of so high a nature as the security which was intended by the statute. That alone is decisive.

BULLER, J. This undertaking is void, considered in every point of view. The cases respecting executions of fieri favors. I i i cias,

Rogens against Renves.

cius, or persons in execution on capias ad satisfaciendum, do not affect this question; because the statute speaks only of persons arrested on mesne process. The statute of the 23 H. 6. requires the bond to be given to the sheriff, as such, for the appearance of the party; and for no other purpose. And it is admitted, that if there be any other condition expressed in the bond, it is void. This is bad therefore on both grounds; for first it is not given to the sheriff himself, and it is for something independent of the appearance of the defendant.

The statute does not authorise sheriff's bailiffs to take obligations for the appearance of persons arrested, as was contended by the counsel for the plaintiff: it expressly mentions the bailiff of a franchise, and only means those officers who have the return of process; for where the process is directed

to the sheriff, 'the indemnity must be to him.

Then as to undertakings by attornies; it is true that this court will not supersede an act of parliament by any regulations of their own concerning the officers of the court; but that is not the case with respect to the practice against attornies. The statute speaks only of obligations given to the sheriff, and does not extend to such as are given to the party. In Sid. 132. and 1 Lev. 98. the promise to the bailiff was good, because made on the plaintiff's part. In Hall v. Carter (a) it . is said, though the sheriff cannot take a bond in any other form than that prescribed by the statute, yet the party himself may. The distinction therefore is between those cases where the undertaking is to the plaintiff in the cause, and those where it is made to the sheriff: if the latter, the form of the statute must be strictly pursued. When an application is made against an attorney on his undertaking, it is by the plaintiff against him to compel a performance of a contract entered into to him; and on that ground it is valid. And therefore the rule of the Court stands prefectly clear of the regulations of the act of parliament.

Let the postea be delivered to the defendant.

(a) 2 Mod. 304.

1786.

The KING against The Mayor and Aldermen of LON- Tuesday, DON.

Nov. 14th.

T. E. TOMLINS obtained a rule on a former day calling A mendamus on the defendants to shew cause why a writ of manda- to the mayor mus should not issue directed to them, commanding them to and alderadmit Thomas Tomlins to the office of one of the auditors of don, to adthe chamberlain's and bridgmaster's accounts of the city of mit a person to the office London.

ndon.

The affidavits, on which the rule was founded, stated that of the chamthe office of auditor was an ancient office; and had been ex-berlain's and ercised and enjoyed by four liverymen of the city, annually bridgmasters elected and chosen by the majority of the livery in common who had hall assembled. That it had been usual and customary for the served it sheriffs of the city present at such election to declare by the three years mouth of the common serjeant of the said city the said elec-successively, tion to the livery then present, as made by the majority of the lected again livery, and immediately report the same to the Lord Mayor the fourth and Aldermen, who being informed thereof, had been used by the livery, and accustomed to declare again, by the mouth of the recorder refused, because the of the said city, to the livery present at the common hall, at custom of the close of such election, such choice and election of auditors, the city ap-That Thomas Tomlins at Midsummer 1783 had been duly elect-peared to be, ed and admitted to, and served, the office of auditor for one son about be year. They then stated a similar election and admission at elected to, or Midsummer 1784 and a service of the office. At Midsummer serve, the 1785 there was a third election of Thomas Tomlins by the li-more than very; but the recorder then declared that the court of alder two years men gave no opinion as to this election; and he accordingly successively. served that third year. At Midsummer 1786 Thomas Tomlins, together with three others, were elected and chosen auditors

for the year ensuing by a majority of the livery, (there being then two other candidates) but the sheriffs having returned all the six candidates to the court of aldermen, they by the mouth of the recorder then declared to the livery then assembled the usage in the election of auditors to have been, that a livery man having served the office of auditor for two years successively should go out of that office, and another should be elected in his stead. Notwithstanding such declaration a poll had been demanded under the stat. 11 Geo. 1. c. 18. when Thomas Tom-

lins and three others had a majority of votes. But at the

1786.

close of the poll the recorder again declared four of the other candidates duly elected.

The King against
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The ground on which the rule had been obtained, was that the usage was rather an exemption in favor of a person who had served the office two years, than a disqualification to fill it a third year.

The affidavits in answer to this application stated the usage in the election of auditors to be, that no person should be elected to or serve the said office for more than two years successively; by reason of which Thomas Tomlins having served the office two years was ineligible the third. They further stated a bye-law made in common council on the first day of August 1552, by which it was ordained that the surveyors of the bess-brewers (now called ale-conners) should be elected in a particular manner, and then in the end of the second year the same fresh two commoners to be amoved from the said affice and other two then to be thereunto newly elected and chose, in like sort and form as the auditors of the chamberlain and of the bridge of the said city are yearly elected and chosen.

The Recorder, Mingay, Silvester, Rose, and Gibbs, were to have shewn cause: but the Court, having heard the affidavits read which were filed in answer to the application, desired to

hear the counsel in support of the rule.

Douglas and T. E. Tomlins in support of the rule. objection which was made at the time of the election to the ineligibility of Tomkins was founded on a supposed usage not a custom, that every liveryman who had served the office of auditor for two years had gone out, and another had been elected in his stead. But the recorder did not at that time declare that such liveryman was absolutely ineligible the third year. This supposed usage must have arisen from the circumstance of there having been no instance found, on searching the records, of the same person having served this office for more than two years; but that circumstance may easily be accounted for in another way. For considering that this is a very troublesome office, and not attended with any emolument, it is natural to suppose, that the fact of there having been no such instance proceeded from the unwillingness of the livery to force such an office upon the same person for a longer time. That sort of negative proof is never to be relied on, for it may be carried to the most absurd lengths. Suppose no instance could be found of any liveryman, belonging to a particular company, or living in any particular ward, having been elected to this office, that would be no proof of such person's being

being ineligible; at least so as to induce the Court to decide upon the question of right in this summary method of proceeding, wishout putting it in a more solemn mode of trial. The King against T a Mayor

But even allowing that in fact there has been no instance and Alderof any person's having served this office for more than two
wears successively, that indeed may be evidence of a custom of
ineligibility, but like all other evidence may be rebutted: for
usage is only evidence of a custom; though, if uncontradicted, it may be decisive. It does not appear but that this usage
may have originated in a bye-law; and if so, it would not
be good as a custom, because the office of auditor is prescriptive. And there is the more reason for this supposition, because it is stated that a similar usage as to the office of berebrewer is founded on a bye-law.

Even if the court shall be of opinion that the usage is well founded, yet the party applying is entitled to this mandamus. Because if he were ineligible after having served the office two years auccessively, yet at any rate there is an intermediate year since that time, and he is now become eligible again. The circumstance of his having de facto served the third year cannot vary this question; for if he were not eligible de jure, the court will not consider him as having filled the office at all that year. In the case of the King and Godwin (a), the Court would not decide upon a summary motion, whether a person having been mayor de facto a second year, by holding over, was thereby rendered incligible the third year; and therefore they granted a rule for an information in nature of a quo warrante, in order that the question might be tried.

Again, this question ought to be sent to a jury, for it is not such an one as can be decided by the certificate of the recorder; for he cannot certify in any question in which the corporation themselves are parties. Hob. 85. recognized in Jank. 21. Besides part of the corporation dispute the existence of such a custom.

ASHHURST, J. It is true that an application for a mandamus is made to the discretion of the Court, but that discretion must be governed by certain principles. It is never granted merely for asking: some reason must be assigned for it. But in the present case no ground whatever has been laid before the Court. The party making the application has neither taken upon him to impeach the custom set up in opposition to his claim, nor has he produced any one instance of

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LOXBON.

any person having been elected a third year, after having served the office for two years successively. We would grant the The King mandamus in order that the right might be tried, if there were The Mayor any ground for it. But here is nothing to be tried. and Alder. mandamus is applied for, merely to see whether there is any thing to be tried or not.

On the other hand there is a positive custom stated, that no person shall be elected to or serve the office of auditor for more than two years successively. And this is further corroborated by what is said in the bye-law made in Edward the Sixth's time; in which it is ordered that the bere-brewers are to be amoved at the end of every second year, in like sort and form as the auditors of the chamberlain and of the bridge of the city. That is a decisive ground to shew that the usage with respect to the office of auditors has subsisted at least as far back as the time when that bye-law was passed.

BULLER, J. No person is entitled to a mandamus merely on asking for it. The party making this application came at first upon very slight grounds. I rather thought that the motion was intended as an address to the recorder to state what the custom was, and then to argue on the meaning of the words.

But even if it had rested on the words of the usage as stated at the time of applying for the rule, I should not have had much doubt. However the case is much altered. It now appears that the parties were apprized of the objection at the time of the election. They understood the recorder at that time to have stated the custom as it now appears to be on the affidavits produced on behalf of the city. For, the first time the recorder came upon the hustings, he told the livery that the Court of Aldermen would give no opinion as to the validity of Tomlins's election; but he afterwards declared the usage to be that a liveryman, who had served the office of auditor for two years successively, should go out, and another be elected in his room. These words can only be understood in one sense. When the counsel for the party applying were apprized of the grounds on which the Court of Aldermen had rejected Tomlins, they should have stated the words of the usage, and argued upon them; but they have shrunk from that: the words indeed are too strong, for they are in the negative, that a person shall not serve for more than two years successively.

This is not like the case in Douglas; for there the facts were clear, and the whole depended on a question of law, which never had been determined, but which was of general importance to every corporation in the kingdom; and therefore the court would not decide it in a summary way on motion, without giving giving the parties an opportunity of putting the whole case upon record. But here the prosecutor has laid no facts before the court on which any question can arise.

We cannot go upon the supposition that this usage originated from a bye-law; for, if it did, that fact should have been expressly stated by the prosecutor as a ground of objection.

Rule discharged.

The King against
The Mayor and Aldermen of
London.

## BROCK against RICHARDSON.

Wednesday,.
Nov. 15th.

THIS was a suit in prohibition; and the question was If a modus whether within the chapelry of Witton Gilbert there is be not provamodus for every inhabitant to pay three halfpence for every ed as laid by milch cow at the time of calving in full satisfaction for the ima suit in tithe of calves?

At the trial of this cause at the last assizes at Durham bethere must fore Heath, J. there was no contrariety of evidence; and the beaverdict for the dejury found the modus, with this variance, that it was payable fendant. But at Easter, and that it did not extend to certain lands within the if any mochapelry, called the Copse Lands, consisting of five farms, dusbe which were exempted from the payment of these and all other though distithes. Verdict for the plaintiff, with liberty to move to set ferent from it aside in this court without costs.

Wood having moved to set aside this verdict on the ground that is a ground for that, as this was a claim by prescription, the jury ought to the court to have found the modus as laid in the declaration or not at all; refuse a conChambre now shewed cause. The variance between the sultation.

modus laid and that proved is no ground for a new trial, or to entitle the defendant to a verdict. An issue in prohibition to try a particular modus is extremely different from issues in other suits; for, whether one sort of modus or another be found, it is equally a reason to warrant the prohibition (a). The very ground on which a prohibition is prayed for is a suggestion that the ecclesiastical court is proceeding to try a question of which they have no cognizance. The fact which is tried in suits in prohibition is merely for the information of the court. This is in some respects like an issue directed by the court of chancery to try a particular custom, which is merely for the information of the chancellor, and which may be indorsed specially on the postea according to the truth of the fact. He was then stopped by the court, and

BULLER,

(u) Dyer 170, 1. Hob. 192. 1 Ventr. 32.

Brock ngainst Richard BULLER, J. said it was too clear for any further argument. The authorities cited are directly in point as far as they go. It appears from them that no consultation ought to be awarded: but it is equally clear that the verdict must be entered for the defendant.

In order to try a particular modus one party alleges, and the other denies, the existence of it; that is the only issue on the record to be tried. As the plaintiff therefore has failed in proving the modus as alleged in pleading, the verdict must be entered specially for the defendant, who is entitled to his costs. But though the modus be not found as laid, yet if any modus be found, that is a sufficient ground for refusing a consultation.

Per Curiam. The verdict must be entered specially for the

defendant; and no consultation will be awarded.

N'est**seeday,** Nov. 15th.

## STOCKS against BOOTH.

Possession for above 60 years of a pew in a church is not a sufficient title to maintain an disturbance in the enjoyment of it; but the plaintiff must prove a prescriptive right, and should claim it in his declaration as appurtenant to a messuage in the parish. A faculty to a man and bis beirs is

bad.

Possession for above 60 ration stated that the plaintiff in his pew. The declaration stated that the plaintiff had a right to this pew, without laying it to be appurtenant to a messuage in the parish. At the trial of this cause before Buller, J. at the last Tork assizes, the plaintiff did not set up any claim under a faculty from the bishop, or shew any enjoyment in respect of any house, but offered evidence of possession for above 60 years, the case for and would have derived a regular title from one Chappel, to whom the minister and church-wardens in the year 1718 gave their consent in writing to build the pew in question.

The learned judge, being of opinion that this did not entitle the plaintiff to recover, directed a non-suit; which

must prove a prescriptive right, or a faculty, to support the plaintiff's action. 2dly, That if a faculty were and should olaim it in his declaration as apsion was sufficient to maintain it against a wrong doer.

Chambre now shewed cause, and contended that no title to a pew can be derived but by prescription, or by a faculty.

There is no pretence for the first; for it was stated by the plaintiff's counsel at the trial that the pew was built in 1718.

Native is any title claimed under a feaulty.

Neither is any title claimed under a faculty. But, even if there had been one to the person who built the pew, this action could not have been maintained, because that person could not have

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STOCKS against Booth

have conveyed his right under that faculty. A faculty is only to the first grantee, and cannot be transferred by him. A faculty to a man and his heirs (a) is not good in point of law; for a seat in the church does not belong to the person but to the house. This doctrine is recognized in the case of Langley v. Chute (b). The parishioners, who repair the church and the pews in it, are entitled to seats in the church; the power of the ordinary is merely to distribute the pews among these, and does not extend further.

As to the possession, on which the plaintiff relies, there can be no possession to support such an action as the present, but as belonging to the house. He was then stopped by the court.

Wood, in support of the rule, admitted that the plaintiff in this action had not a complete title as against the ordinary; but contended that it was a sufficient title as against a wrong doer.

1st, No faculty was necessary. In Burn's Ecclesiastical Law (c) it is said, "if the incumbent, church-wardens, and parishioners, agree that more pews are necessary, it doth not seem that there is any necessity for the ordinary's interposition." Therefore the plaintiff has made out a sufficient title under the consent of the minister and church-wardens in 1718 to build this pew.

2dly, But a faculty, if necessary, may be presumed, the plaintiff and his ancestors having had actual possession above 60 years. In Rogers v. Brooks (d) possession for 36 years was held to be evidence of a prescriptive right, though there was no evidence of a faculty from the bishop, and though the

church itself had been rebuilt within 40 years.

3dly, There might probably be a doubt whether the plaintiff had a right as against the minister or the ordinary. But the defendant was a wrong doer unauthorized by either of these persons: and great inconvenience would result from permitting the defendant to disturb the plaintiff in the enjoyment of his pew; because the defendant himself may be evicted the next moment, and it would encourage a perpetual struggle for the possession of the pews in the church. In Kenrick v. Taylor (e), it was held that bare possession was sufficient against a wrong doer; and that the plaintiff need not shew repairs in an action against him, which would have been necessary in an action against the ordinary, (which distinction was taken in 1 Lev. 71. and 3 Lev. 73.) and the court there said " that it was a rule of law. "that one in possession need not shew any title or considera-" tion Kkk Vol. I.

<sup>(</sup>a) Poph. 140 (b) Sir T. Raymond, 246. (c) 1 Burn. 231. (d) M. 24 G. 3. B. R. vide post. 431. n. a. (e) 1 Wile. 326.

STOCKS against BOOTH.

"tion for such possession against a wrong doer." The same doctrine is laid down in Gibs. Cod. 197. 8. With respect to the purpose of this action, as the plaintiff had possession he need not shew any title. Though in the case of Kenrick v. Taylor it was laid as appurtenant to a messuage, yet that is not necessary; since a faculty would undoubtedly give a right, and that may be only to the person. Besides it is said in that case in Wilson, that it is not necessary to prove a title as against a wrong doer: now if it be not necessary to prove it at the trial, it is not necessary to allege it in the declaration; for the plaintiff need only allege that which he is bound to prove.

ASHHURST, J. In an action against a wrong doer possession may perhaps be prima facie a sufficient title, and it is not necessary to set forth so stict a title as in an action against the ordinary. As to the case in Wilson, where it was said that laying the pew to be appurtenant to a messuage was sufficient; that must be taken to be legally appurtenant, which can only

be by prescription, or by a faculty.

But a bare possession can never give a right, because every parishioner has a right to go into the church. And therefore it is the plaintiff's own fault if he do not gain to himself a complete title to a pew, which he may do, either by applying to the ordinary for a faculty, or to the minister or churchwardens to allot him a seat in the church. But, if the plaintiff will not take the trouble of applying to the ordinary for a faculty, or to the minister or church-wardens to allot him a seat, he cannot maintain this action, though against a wrong doer; because he has not set forth that the pew is appurtenant to a messuage in the parish. If bare possession were allowed to be a sufficient title, it would be an encouragement to commit disorders in the church; for disputes would frequently arise respecting the possession.

Buller, J. This is an action on the case, and not an action of trespass. Trespass will not lie for entering into a pew, because the plaintiff has not the exclusive possession; the possession of the church being in the parson. The word "possession" must always be understood secundum subjectam materiam. Therefore in an action on the case for disturbing the plaintiff in his pew, for which trespass will not lie, the plaintiff must prove a right either by prescription or by a faculty. I do not go the length which the defendant's counsel went, in saying that a faculty only extends to the first grantee; for if a faculty be annexed to a messuage, it may be transferred with the messuage to another person. And therefore if the plaintiff had declared for disturbance in a pew as annexed to a messuage in

the parish, such a right would have been colorable, and against a wrong doer would have been sufficient. A pew may be annexed to an house by a faculty, as well as by prescription, for the latter supposes a faculty. I have lately seen a faculty for exchanging seats in a church: after stating that  $\Lambda$  in right of a particular house in the parish had immemorially a right to a certain pew in the church, the ordinary gave his consent to exchange it for another; but still each was annexed to the house. There cannot be a gift of a pew to a man without a faculty: it was so said in the case of Rogers v. Brooks, (a) in which case it was laid as appurtenant to an ancient messuage. It was also said in the case in Wilson that it must be laid as appurtenant to a messuage. But there never existed a case before the

STOCKS hyainet Booth-

(a) Rogers v. Brooks and wife. M. 24 G. 3. B. R. This was an action on the case tried at the summer assizes at Exeter, 1783, before Perrys, B. when the jury found a verdict for the plaintiff, damages 1d.

the jury found a verdict for the plaintiff, damages 1d.

The declaration stated that the plaintiff was possessed of an ancient messuage in the parish of Biddeford, and that he had, as appurtenum to that messuage, the use and occupation of a certain pew in the church in Biddeford; and that the wife of the defendant sat in the pew, and prevented him from enjoying it, &c.

Plea the general issue.

At the trial notice to the defendant's wife not to sit there was proved. Several witnesses swore that above 40 years ago this was an open pew; that about that time the church was pulled down; and that the rector and church-wardens, after the shurch was rebuilt, put the Blincb family (under whom the plaintiff claimed) into possession of the pew, which they had enjoyed uninterruptedly ever since, till about two years ago; when the defendants (who claimed under another messuage in the parish, called the Winsford estate) began to molest them. That about 36 years ago the plaintiff put a lock upon the door, and lined and matted the pew. As if to claim for the Winsford family, but she was turned out by the Blincb family.

One witness for the defendant swore that the Wineford family sat in the pew for 13 years after the rebuilding of the church; and she and other witnesses

swore as to the pew's being common.

The judge told the jury that, after so long a possession as 36 years, they might presume a legal title in the plaintiff. The jury without hesitation found

a verdict for the plaintiff.

Motion for a new trial on the ground that there was no evidence to be left to a jury: because from the plaintiff's own witnesses it appeared that the seat was common 40 years ago; and that they had proved a gift from the rector and church-wardens since the rebuilding of the church. This evidence, it was contended, destroyed the plaintiff's title which he claimed by prescription.

After argument by Grose Serjeant and Fanshawe against the rule, and Morris

and Kirby Serjeant in support of it;

Lord Manafield said, the question in this case is, whether there was any evi-

dence at all to be left to the jury?

The plaintiff's title to this pew is that it has immemorially belonged to the house which he possessed. The defendant has set up a joint title in the right of the house enjoyed by himself and another person. The plaintiff in support of his claim proved that he was put in possession of this pew by the rector and churchwardens 36 years ago. The question is, Whether this act of the rector was to give possession under an old immemorial right, or in consequence of a new gift? There are strong reasons to induce us to suppose it was not a gift: they would

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present, where the plaintiff attempted to make out a title to a pew without laying it to be appurtenant to a messuage.

A faculty of a pew to a man and his heirs is not good; so of an aisle in the church. And Dr. Burn says (a) " no title " can be good either upon prescription or upon any new grant "by a faculty from the ordinary to a man and his heirs; but " the aisle must always be supposed to be held in respect of the "house, and will always go with the house to him that inha-bits it. 12 Co. 106. 2 Keb. 92. 2 Bulstr. 150. 1 Sid. 88.

Therefore I am of opinion that this nonsuit was right. Rule discharged (b).

not make a gift of that which other people claimed. A gift cannot be made withcut a faculty; and there is none in this case.

The Winxford family have acquiesced for 36 years, which is almost double the 'time which the statute of limitation requires as a bar in certain cases.

Willes, J. It is observable that an attempt was made to disturb the Bliach family in the enjoyment of their pew soon after the rebuilding of the church; but their right has been acquiesced in ever since.

One of the defendant's witnesses swore false, in saying that the Wintford family sat in the pew 13 years after the church was rebuilt; for the church has only been built 40 years, and the Blinch family are proved to have sat there 36 years without interruption.

It is very common, when a church is rebuilt, to leave the adjustment of the pews to the rector and church-wardens; and thus I suppose the plaintiff get his pew, at the adjustment, in right of his messuage. But after so long a possession, I would presume any thing in favour of the plaintiff.

Per Guriam (\*). Buller, J. was absent. Rule discharged.

(a) 2 Burn's Ecc. Law, 316.

(b) Vid. Cross v. Salter, post. 3 vol. 639. and Griffith v. Masthews, post. 5 vol.

Priday. Nov. 17th. SWIFT on the Demise of HUNTLEY and WIFE against GREGSON.

Under a power of appointing a real estate " to the use e of such " children,

IJECTMENT for an undivided moiety of an estate in Durham.

This was tried at the last Durham assizes before Heath, J. when a verdict was found for the lessors of the plaintiff, subject to the opinion of the court of King's Bench on the fol-" child and lowing case.

That by virtue of a deed of settlement, bearing date the 25th " &c." (and where in de. of April, 11 Geo. 2. and by a fine in the said deed of settlement fault of ap- covenanted to be levied, and afterwards duly levied accordpointment the estate

was settled " to the use of all and every the child and children,") an exclusive appointment to one is good

SWIFT against

GREGION.

ingly, Giles Rain, of East Morton in the county of Durham, gentleman, and Mary his wife, in consideration of a marriage intended to be solemnized between John Gregson the younger, of East Burdon in the said county, and Eleanor Rain (daughter of Giles Rain) the nephew of the said Giles Rain, granted and conveyed to John Johnson and Thomas Todd, and to their heirs and assigns, all the aforesaid premises in the said declaration in ejectment mentioned to and upon the several uses therein mentioned concerning the same, (which said uses are all rebehoof of such child and children of the said John Gregson the younger, on the body of the said Eleanor Rain his intended wife, begotten, or to be begotten, and for such estate and estates, intents and purposes, as the said John Gregson the younger, should at any time, by any deed in writing, or by his last will and testament in writing, or any other writing purporting to be his last will and testament, under his hand and son the younger, his heirs and assigns for ever."

spectively determined;) and afterwards, and after the death of the said John Gregson the younger " To and for the use and seal, to be executed in the presence of two or more credible witnesses, limit, direct, or appoint; and for want of such limitation, direction, or appointment, or as and when the trust and trusts, estate or estates, so to be appointed should respectively end or determine; then to the use and behoof of all and every the child and children of the said John Gregson the younger on the body of the said Eleanor Rain lawfully begotten, or to be begotten, and the heirs and assigns of such child and children equally share and share alike, and to take the same as tenants in common, and not as joint tenants; and for default of such issue then to the use and behoof of the said John Greg-

That John Gregson the younger, by a deed dated Feb. 2d. 1786, duly executed, reciting the deed of settlement, and that the said marriage was solemnized between the said John Gregson and Eleanor Rain, and that the said Eleanor died, leaving by the said John Gregson two children, to wit, Rain Gregson and the said Mary Huntley, limited, directed, and appointed, that the premises comprized in the said settlement of the 25th of April 1738, should, from and after the decease of him the said John Gregson, go, remain, and be, and that the said settlement and the fine thereupon levied should be and enure to the use of the said Rain Gregson, and the heirs of his body lawfully begotten, or to be begotten; and in default of such issue to the use of the said Mary Huntley, her heirs and assigns for ever.

That the said John Gregson the younger is since dead; and that Mary the wife of Thomas Huntley, the lessor of the plainSWIPT

against
GREGSON.

tiff, and Rain Gregson the defendant at the time of the death of the said John Gregson the younger, were and are the only surviving children of the said John Gregson the younger.

The question for the opinion of the court is, whether the

lessors of the plaintiff are entitled to recover?

Law for the plaintiff contended, 1st, that under the terms of this marriage settlement it was necessary for John Gregson to make a beneficial appointment to and amongst all his children; and that he could not limit the estate in such a manner, as virtually and substantially to exclude one of them. 2dly, That such beneficial appointment had not been made, and consequently the power not well executed; inasmuch as the appointment to one of a contingent remainder in fee after the expiration of an estate tail (which might be immediately barred by a recovery) was virtually and substantially an exclusion of such child to whom that interest alone is appointed.

In considering the first question, the grammatical sense and construction of the words plainly import, that the appointment must be among the children; to the use of such child, if only one; and to the use of such children, if more than one; and for such estates as the father should limit. He had under this power an authority to settle the share he might give to each in strict settlement; he might give those shares in larger or less proportions at his pleasure; but the conjunctive word " and" is not satisfied unless he gave some estate to each. The reason of adding the words such child and for such estate, in the singular number was only to indicate the intention of the parties. that the father should have some discretion as to the estate which he might give such child, if there were only one. For in Roe dem. Buxton v. Dunt (a), though, as Ld. Ch. J. Wilmot thought, the father could not give the child less than an estate for life, with remainder to-his issue in tail; yet he was not obliged to give him more than an estate tail. The words " such child " and children" must be taken in the conjunctive, unless the intention is manifestly the reverse: but an equality of distribution seems to have been the favourite object of the settlers, as being the casus provisus, in default of appointment; and therefore if the words themselves be doubtful, they should be construed in support of this intention. There is no case to be found where the word " and" is used in a power of this kind, and an exclusive appointment to one allowed. In Co. Lit. 113. a. it is said, that if a will give a power to sell to three persons by name, and one of them die, the survivors cannot sell. for the words of the will cannot be satisfied. Words must be expounded

expounded conjunctim, where they are with a copulative; as if A. lease for twenty years, if B. and C. so long live; if one of them die, the lease determines. Cro. Jac. 378. The latter words in detault of appointment, " to all and every the child and children" must mean the same as "child and children" in the former part; and they shew that the power must be executed in favour of every one of the children.

1786. Swift against GREGSON.

He admitted that a power to give to one or more of his children, as in Thomas v. Thomas (a); or to any of his children, as in Tomlinson v. Dighton (b); or to and amongst all or such of his children, as in Macey v. Skurmer (c); or to such of his children, as in Liefe v. Saltingstone (d); gave the trustee a power of appointing exclusively to one child only. But no case has determined that "such child and children" shall be taken in the disjunctive. In Alexander v. Alexander (e), where the wife had the power of disposing of 6000l. "unto " and among such children, &c. and in such proportion, &c." Sir T. Clerk said, " considering the nature of the power, the 44 wife was confined as to the objects to give it to, but left to 44 her discretion as to apportioning it among them. In consequence of this she was obliged to give the whole among "the children; every child must have some, such share as " she pleased, provided not elusory."

BULLER, J. In Spring dem. Titcher v. Biles (f), an exclusive appointment, under a power of appointing "to and s amongst such of his relations," was held good.

Law. But that was not the case of children.

2dly,

(a) 2 Vern. 513. (b) 1 P. Wms. 149. (d) 1 Mod. 189.

(c) 1 Atk. 389. (e) 2 Vez. 640.

) Spring, on the demise of Titcher v. Biles and another, M. 24 G.S. B. R. This ejectment for lands in Dibden, and five copyhold estates in the manor of Eling, in the county of Southampton, was tried at the Summer Assizes at Winton, 1783, when a verdict was found for the lessor of the plaintiff, subject to the opinion of the court on the following case;

James Abrabum, of Heith in the said county, being seized of a freehold estate Dibden, and of four several copyhold estates in the manor of Eling, on the 17th of April 1746 duly made his will, and thereby (inter alia) devised as follows; "I give unto my relations John Abraham and Isaac Abraham 51. each; Elizabeth Abraham 151. Mary Abraham 51. William Biles 51. John Biles 51. and Mary Biles 5l." And after some other bequests, he gave the residue of his real and personal estate to his wife Mary for life. Then followed this clause; "And my further will is, that my said wife shall, and I do hereby give her full power and authority to dispose of the same, in and by her last will and testament, to 46 be duly made and executed, to and amongst such of my relations as shall be living at the time of my decease, in such parts, shares and proportions as my said wife shall think proper " Of this will he made his wife sole executrix."

James Abrabam was admitted to all the said five copyhold estates to him and his heirs for ever by five separate admissions; to wit, to one on the 11th December 1733; to two on the 12th May 1735; to one on 8th May 1745; and to one on 26th September 1749; which last he purchased after making the will. On the 9th May 1750 the said James Abraham surrendered into the hands of the

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1786. Swift

2dly, Each of the children being entitled to a beneficial interest upon the true construction of the settlement, the appointment which

GREGOOM. lords of the said manor "all and every his copyhold lands, tenements, and he"reditaments, held by four copies of court roll of the said manor, to the use and
"behoof of such person and persons, and for such estate and estates, and under
"and subject to such conditions, limitations, and provisoes, as the said James
"Abraham, by his last will and testament, signed in the presence of three or
more credible witnesses, shall direct or appoint.

By the custom of the manor of Eling, the widow of every copyholder is entitled to her free bench for her widowhood in every copyhold estate, of which the

husband dies seised.

On the 1st of February 1755 the said James Abraham died seised of the said freehold and five copyhold estates, without making any other devise or disposition.

On the 21st May 1755 the widow was admitted to all.

On the 3d of August 1757 she surrendered all the copyholds to the use of her will. By indentures of lease and release, dated the 6th and 7th March 1758, between Mary Abraham, as the widow and devisee of her husband of the one part, and P. Titcher, the lessor of the plaintiff of the other part, after reciting the said will, she, in pursuance of her power and in consideration of 5s. paid by the lessor of the plaintiff, conveyed the freehold to him and his heirs and assigns, to

her use for life, and then to his own use in fee.

On the 22d February 1760 Mary Abrabam made her will, attested by three witnesses, whereby, after reciting the power vested in her by her late husband's will, and the said indentures of lease and release, which she confirmed, she gave, devised and bequeathed the same unto the said P. Titcber, his heirs and assigns for ever, subject nevertheless to an annuity of 5l. payable to Joan Macber for her life: but if the said testatrix had not then full power so to charge the said premises, then the said testatrix did charge and subject the several copyhold premises after mentioned to and with the payment thereof. And the said testatrix, after so charging and subjecting the said copyhold premises, (being the same copyhold premises as are contained in the said five several admissions above set forth,) gave and devised all the said copyhold premises to the said P. Titcber, to hold unto and to the use of him the said P. Titcber, his heirs and assigns for ever, according to the custom of the said manor.

On the 24th December 1780 the said Mary Abrabam died without having revoked her said will, or made any other disposition of the said freehold and copyhold lands. And on her death the defendant (Biles,) as heir at law of James Abrabam the testator, was admitted to the said several copyhold estates, to hold to him, his heirs and assigns for ever, according to the custom of the manor:

and he entered upon the same.

On the 23d March 1782 the said Biles surrendered four of the copyholds to the defendant Smith, his heirs and assigns, according to the custom, and he has been admitted.

On the 25th July 1783 the lessor of the plaintiff was admitted to all the co-

pyholds.

The lessor of the plaintiff is the grandson of Philip Titcher and Eleanor Mills, which Eleanor Mills was the daughter of Arthur Mills and of Martha his wife, which said Arthur was the first husband of the said Martha, who after the death of Arthur married one James Abraham, by whom the said Martha had Jesses Abraham the devisor. And the said lessor of the plaintiff was living at the time of James Abraham's death.

The defendant Biles is the heir at law of the testator.

The question is, whether the lessor of the plaintiff is entitled to the possession of all or any and which of the aforesaid freehold and five copyhold estates?

Jekyll for the lessor of the plaintiff made three questions; 1st, Whether the four copyholds passed by the surrender containing words of futurity, by referring to a will which was then in being.

2dly, Whether the fifth copyhold, purchased after making the will, passed by

the will.

3dly.

which has virtually excluded the lessor of the plaintiff is not a good execution of the power.

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3dly, Whether the wife had daily executed the power given to her by the will of her husband;

The arguments on the two first points being irrelevant to the present question are omitted.

As to the third, he contended that whatever is an equitable ought to be deemed a legal, execution of a power. This is the execution of a power by the donee of a particular estate, and ought to be liberally construed. 1 Vent. 228. 2 Burn. 1145, 2 Vent. 87. The word "such" is a word of election, and enabled the wife to give the estate to which of his relations she chose. In doubtful cases only, and where there is no execution of a power, equity resorts to the statute of distribution. Roach v. Hammond, Prec. in Chan. 401.

Burrough for the defendants, as to the third point, contended that the lessor of the plaintiff had no title either to the freehold or any of the copyholds, because Mary Abraham had not pursued the power given her by her husband. It was manifestly the intention of the husband to confine the wife in the disposition of this property to those relations who were mentioned in the beginning of the will; the words "such of my relations" being words of reference to "my relations" in the former part of the will. And the lessor of the plaintiff is not

one of those relations.

In Harding v. Glyn, 1 Atk. 469, where it was uncertain what persons were meant by "relations," the Master of the Rolls decreed that the property should be divided among such of the testator's relations as were his next of kin. In Hards v. Hands, at the Rolls, 24th June 1782, the testator gave his goods and stock, ready money, debts, effects, and the remainder of the lease of a farm in his occupation, and all other his estates whatsoever, subject to his debts, legacies, and inneral expences, to his wife, and declared his will to be, that "his wife "should at her decease give unto and amongst bis relations, what should remain so what he had thereby given and bequeathed unto her, except 4001. which she should be at liberty to dispose of as she should think fit." His Honor, upon a bill by the next of kin of the testator against the wife to have the property secured, was of opinion that the next of kin at the time of the death of the testator were entitled to vested interests, though in uncertain proportions, and offered the property to be secured by payment of the clear residue, except the wise of the stock of the farm, into the bank; and by directing the wife to give security for answering at her death the value of the stock, which it appeared it was intended by the testator she should have for her life.

But even if the wife were not restrained to give it to those relations exclusively, and that she had a latitude in the exercise of the power by giving it to any relations however remote, still she has not executed the power properly, because under a power to give "to such his relations" she could not elect one only, but she was bound to distribute 1 Vern. 66. 2 Vern. 512. Cragrave v. Perrost. Roc Coo. Abr. 345. Macey v. Shirmer, 1 Atk. 389. Meuzey v. Walker, Cas. semp.

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Liord Mansfield, Ch. J. after stating the ease;

Three questions have been made ;

1st, Whether the surrender has relation to a will then in being? It is clear from the surrender that the testator meant that the copyholds should pass as well as the freehold; for the words of the will are very full. Finding afterwards that there was a defect as to the copyhold estate for want of a surrender, he surrendered them to such uses as he should by his will direct. The testator had then a will whereby he had clearly declared that his copyholds should pass. And it would be strange to say that the surrender destroyed his intention. A will speaks at different times for different purposes; to many purposes from the date; to other purposes from the testator's death. It amounts in some degree to a republication; and I am clear that the surrender referred to that will which should be in existence at the time of his death.

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In Gibson v. Kinven and others (a) a legacy of five shillings to one child by a widow, under a power of disposing of money for the benefit her children, was set aside, and the Lord Chancellor decreed an equal distribution. In Pocklington v. Bayne (b) an appointment of one acre to two children for life. under the power of appointing to all and every the children, was decreed by the Lord Chancellor to be elusory. And in Alexander v. Alexander, Sir T. Clarke said, " one restriction " she was under, that she could not have given any one child " merely a reversionary interest; for it was intended as a pro-"vision, and therefore it would be deemed elusory." This contingent remainder in fee, after an estate tail, is elusory; it is of no value in contemplation of law, and is not considered as assets by descent in the hands of an heir; for till he comes into possession, he is not chargeable, and may plead riens per descent. 3 Mod. 253. 3 Lev. 286. 2 Mod. 50.

Graham.

(a) 1 Vern. 66.

(b) 1 Brown's Chanc. Cas 450.

As to the 2d question, whether copyhold lands, purchased after the will, pass by the will? the case of Harris v. Cutler, B. R. Tr. 10 Geo. 3. is decisive, that

they do not.

Sdly, As to the execution of the power, there is no doubt of its being a good There is no colour to say that he meant it should go to the relations mentioned in the beginning of the will. He could not mean those relations to whom he had before given legacies. And though he mentions the word "living" it is superfluous; for he could not give it to a deceased relation. It is a discretion nary power and trust; and although he says "in such shares, &c." that is only to give a discretionary power as to the proportions, if she chose to divide it; but it does not prohibit her from giving it all to one. It is not like the cases where a power is given to devise among children; but even in those cases the reasoning is very subtle, for the person will have duly executed the power by giving a shiftling to every one but a favourite, and the whole to such favourite. If she had died without an appointment it would have been a trust, and it would have devolved on the court, who must have been governed by the statute of distributions. Willes, J. In the case in Atk. though that of a strict power, "such" did not extend to all. Great stress is laid on the word "all" in Fort. 72.

Buller, J. The cases of powers to distribute among children stand on very different grounds; for the courts have considered them as portions to the children; and even such cases where one child has been provided for, a power has been held to be well executed, though nothing was given to such child. But the truth is that the court of chancery has taken great latitude in that respect. We cannot reason from analogy to the cases of personal estate. Where powers are not executed in such cases, the courts have been governed by the statute of distributions; but in the case of real estates it is otherwise. The defendant's counsel was aware that this would not bear him out, and therefore he took a middle line, and contended that by the meaning of the testator the widow was confined to the survivors of the relations mentioned in the will. But I think there are no words of restriction to such relations as before mentioned; and that the power is well executed.

Per Curiam,

Judgment for the plaintiff as to all, except the last-purchased copyhold.

Graham, for the defendant, did not dispute the doctrine of elusory powers, or that a reversion in fee expectant on the determination of an estate tail came within that description; but observed that this case turned on the sense which the court GREGEON. should give to the words " such child and children."

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He admitted that under a power of disposing "to all and " every the child and children," as in the case of Pocklington v. Bayne, every one of the children must take. But he contended that the words in this power to "such child and children" must be construed disjunctively; otherwise "such " child" in the singular number would be perfectly nugatory. For if there were only one child, he would take without any appointment at all; and if an appointment had been made, such only child must have taken. It manifestly appears to be the intention of the parties that the appointer should appoint to any one of the children; for when they meant that every child should take something, they expressly said "to all and every the children" in default of appointment. And besides, this is not a provision for younger children, but a settlement of a family estate, and was not intended to be divided between the children, but to go to one only.

Law in reply. If there were only one child, to be sure the words "such child" would be useless; but the parties might perhaps think that, unless they had provided for the event of there being only one child, the appointment would not have

been good.

As to this being a family estate, and that it is not so divisible as personalty, it could not have been intended that only one child should take, for in the event of no appointment having been made, it would have gone to all the children. And there is no other provision to be made for the issue of the

marriage but out of this estate.

ASHHURST, J. It appears to me that the true construction. of this settlement is, that the father should have a discretionary power to appoint "to any child or children." There is a distinction between a power of distributing personalty as a provision for younger children, and appointing a real estate. the case of personalty it does not appear that there is any other provision for the younger children; and it is a natural construction to be put on such a power, to say, that it was the intention of the parties making the settlement that every one of the children should derive some benefit from the appointment. But in the case of a family estate, it is more natural to suppose that it was intended to be given to one child only.

In

AWIET against GREGSON.

In the present case it was the intention of the parties that the appointer should have it in his power to appoint to any one of the children. The words are "such child and children:" now if it had been intended that all should have derived some benefit, they would have said "among them;" and if so they would not have used the word "child" in the singular number, which could only have been added for the purpose of giving the appointer a power of appointing to one only if he pleased.

The case of Titcher v. Biles seems to me to be a strong case; there an appointment in favour of one, under a power of appointing "among such relations as should be living at

his death," was held good.

BULLER, J. The words of the power are "to and for the " use and behoof of such child and children, and for such es-"tate and estates, &c." The argument for the plaintiff is, first, that where there is a power to give an estate "to and am-"ongst all and every the children," each must have a beneficial part; and secondly, that these words are tantamount to those. My objection is to the minor proposition; these words are not like those assumed. There are no such words in this power as " to and amongst;" but just the reverse. For it is a power to appoint to the use and behoof of such child and Therefore, instead of including all, it says that the appointer may appoint to one only. The plaintiff's counsel admitted that, under a power of appointing "to such of my " children," an appointment to one only would be good; but the present words are stronger. An appointment to one under a power of appointing "to such child and children," is good because it includes one.

The case of Spring v. Biles, with the difference only of spletipns instead of children, is stronger than the present. There the power was "to and among such of my relations, &c." in such parts, shares, "and proportions, &c.;" which imposted that a division was intended. But in the present case the words "parts, shares, and proportions," are not used, and here is no evidence of intention that it should be divided into shares. In that case the court said they had not a particle of doubt but that the word "such" meant one or more. Here therefore it must have the same construction: it must mean

that the appointer might appoint to one or more.

Postea to the defendant.

### SMITH against MAPLEBACK.

1796. Friday, Nov. 16th.

HIS was an action of replevin. The defendant in his Where a first cognizance, as bailiff of William Marmaduke Sellon, lease came acknowledged the taking, &c. stating that the plaintiff, on the hands of the Seh of January 1786, and for one half year then last past, &c. original lesheld and enjoyed the said dwelling-house, in which, &c. as sorby an atenant thereof to William M. Sellon, under a demise to him greement thereof made, at the yearly rent of 401, payable quarterly, to between him wit, on the 8th of October 1785, the 8th of January 1786, the and the as-8th of April 1786, and the 8th of July 1786. And because signee of the 304. for half a year, ending on the 8th of January 1786, were original leain arrear and unpaid from the plaintiff to William Marmaduke " the lessor Sellon, the defendant, as bailiff, &c. acknowledged the taking, "should &c. for and in the name of a distress, &c.

The second cognizance stated that the plaintiff held under "premises a like demise, as stated in the first count, at the yearly rent of "ned in the 314 10s. payable quarterly as aforesaid; and because 151. 15s. "lease, and for half a year ending on the 8th of January 1786, were in "should pay "a particu-

arrear, &c.

The third stated that the plaintiff held under a like demise, "ver and at the yearly rent of 40l. payable quarterly on the four most "above the usual quarterly days of payment, to wit, Michaelmas-day 1785, "rent annu Christmas-day 1785, Ludy-day 1786, and Midsummer-day and the 1786: and because 191. 3s. 4d. for one quarter of a year and "good-will the part of another quarter of a year, ending on the 25th of already "paid by December 1785, (the residue of the rent for the said last quar- " such aster having been before paid and satisfied to the said William "signee;" Marmaduke Sellon) were in arrear, &c. such agree-

The fourth stated that the plaintiff held under a like demise, ment operate as a at the yearly rent of 311. 10s. payable quarterly (as in the surrender of third cognizance;) and because 151. 1s. 6d. for one quarter the whole

and part of another were in arrear, &c.

The fifth, that the plaintiff held under a like demise, at the agreement is yearly rent of 31% 10s. payable quarterly, at the four most usu-considered al days of payment; and because 71. 4s. for part of one quarter as a sum to of a year, ending on Michaelmas-day 1785, were in arrear, &c. be paid an-nually in

The sixth, that the plaintiff on the 8th of January 1786, gross, not and for one quarter of a year then last past and more, held the as rent. said premises as tenant as aforesaid, by virtue of a certain de- And the as-

mise signee caneither for

that or for the original rent; but he has a remedy by assumpsit for the sum reserved for the good-will.

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SMITH against MAPLE-

mise to him thereof made, at the yearly rent of 311. 10s. payable on the four most usual days of payment; and because 71. 17s. 6d. for one quarter of a year, ending on the 25th of December 1785, were due and in arrear, &c.

Plea in bar, that the plaintiff did not enjoy the said dwelling-house, &c. under any such demise thereof made to him as the defendant in his first cognizance alleged; and that the sum of 20% in the first cognizance mentioned, was not, nor was any part thereof, in arrear. The like pleas to the second, third, fourth, fifth, and last cognizance.

On the trial of this cause a case was reserved for the opi-

nion of this court.

The plaintiff, William Smith, being possessed of the premises for a long term of years, by indenture of lease dated the 25th March 1783 demised unto Robert Swin all that messuage or tenement, &c. (the premises mentioned in the pleadings) from the day of the date of the said indenture for the term of eight years, at the yearly rent of 311. 10s. payable quarterly on the four usual quarter days. Robert Swin entered and took possession of the premises under the said lease. By indenture dated 12th of April 1785, Robert Swin in consideration of 145L 13s. assigned the premises to William Swin for the remainder of the term; who, afterwards by indenture dated 6th July 1785, assigned over to the said William Marmaduke Sellon. Sellon entered and took possession under that assignment. The plaintiff, William Smith afterwards applied to Sellon to take the said premises; and the following agreement was entered into between William Sellon and Ann Smith, as agent for her husband the plaintiff. "Agreement between Mr. Smith " and Mr. Sellon for The Three Jolly Sailors at Rotherhithe; " Mr. Smith to have the house on the terms as mentioned in "the lease, and to pay 81. 10s. over and above the rent annu-" ally, towards the good-will, already paid by Mr. Sellon."

The plaintiff Smith took possession of the premises under the said agreement; and the premises described as The Three folly Sailors in the agreement are the same premises demised by the lease of the 25th March 1783, of which the plaintiff William Smith at the time of the agreement aforesaid had the reversion. The defendant as bailiff of William Sellon on the 14th of fanuary 1786 took the distress for one quarter's rent.

The question for the opinion of the court is, whether the defendant as bailiff to William Marmaduke Sellon had a right

to distrain for any and what rent?

Rous



Rous for the plaintiff. The question turns on the effect of this agreement; whether it operates as a surrender of the term, or whether it is to be considered as an under-lease?

SMITH against MAPLE-

This distress was illegal, because Sellon had no interest in the land at the time of making it. And it is perfectly clear that a lessor caunot justify taking a distress, unless he has some interest in the land at the time; for the title to distrain arises from the privity of estate, and ceases with it. It is an indulgence which the law allows to the owner of the land to compel payment of rent by the lessee during that time. So that even where a rent is reserved eo nomine during a term, no distress could at common law be taken after the expiration of that term. Co. Lit. 47. 1 Ro. Abr. 672. This doctrine is recognized by the legislature in the statute 8 Ann. c. 14. which allows a distress to be taken within six months after the expiration of the term, provided the same tenant continues in possession. the agreement entered into between the plaintiff and Sellon, the former was to have the possession of the premises; but with respect to the terms of that possession, they are to be collected only by a reference to the original lease, one of which is that the possession shall continue for eight years: then there is no interest remaining in Sellon which could entitle him to make this distress,

As to the rent; the plaintiff was to take the house by an express reference to the terms of the original lease, that is, by the payment of 31l. 10s. quarterly at the four usual days of payment: but the rent of 8l. 10s. for the good-will is to be paid annually at the expiration of each year, namely, on the 6th of July, and not by quarterly payments. Therefore the first payment of the 8l. 10s. was due subsequent to the time of the distress; and the parties could not intend to unite these two sums which were to be paid at different times and for different considerations. But supposing it could be collected that the intention of the parties was to reserve 8l. 10s. as a rent, yet distress was not incident to it, if no interest remained in Sellon.

This agreement therefore must operate as a surrender of the term. Lord Coke says that surrenders are favoured in law: and at common law a surrender of a lease by deed might be made by parol. Co. Lit. 338. 2 Kol. Abr. 499. L.5. The only difference between a surrender by deed and by parol is occasioned by the statute of frauds.

It will be highly inconvenient and contrary to justice to allow the legality of this distress; because it will be to drive the lessor to his remedy over against the original lessee.

Shepherd

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Shepherd for the defendant contended that this agreement did not amount to a surrender from Sellon to the plaintif. Where there is any interest or even a possibility of interest reserved in the lessee, it cannot be taken to be a surrender. where A, tenant for life, assigns to the reversioner for the life of the reversioner, he may distrain on him; on account of the possibility of his surviving the reversioner. So where a lessee either for life or years leases to the lessor reserving a day, it does not amount to a surrender (a). Where rent was reserved (though the whole interest passed from the lessee to the reversioner) that equally prevented its being considered as a surrender (b). A reservation may be good by contract though without deed (c). He admitted that no particular words were essentially necessary to constitute a surrender; and that it may be collected from the intention of the parties appearing on the instrument executed by them (d). In the present case, it is impossible to say that it was the intention of these parties, as it is to be collected from the agreement, that this should operate as a surrender. It is to be considered only as an under-lease; for the defendant is to hold on the terms of the original lease,

As to the rent of 81. 10s. being payable at a different time from that of the 311, 10s. if it appeared on this instrument that it was the intention of the parties that these rents should be consolidated, it must be considered as payable at the same time as the other sum. In 4 Bac. Abr. 343. it is said, "though "there be no particular days mentioned in the deed for the " payment of the rent, yet if the manner of such appointment " will not fully answer the design of the contract, the law in such " case will alter or transpose the words of the deed; because " it is the great end of the law to execute all contracts. how-" ever unwarily or inartificially framed, according to the pur-" port and true intention of the parties upon the whole deed." Here the intention of the parties is evident, and the Court will supply their defects in point of form (e). Though from the words of this agreement the rent of 81. 10s. is to be paid annually, vet it is evident that the parties did not mean one annual payment; but that sum was to be paid annually by quarterly payments at the same time that the rent was reserved by the original lease. And the agreement is to pay 81. 10s. annually over and above the rent of 311. 10s. which indisputably proves that the lessee was to pay so much per annum at the same time that the original rent is payable.

The

<sup>(</sup>a) 1 Rol. Rep. 587. (b) Dyer, 251. 1 Vent, 272. (c) 1 Ventr. 242. (d) Sheph. Touches. 305. (e) 2 Rol. Rep. 213. Plond. 171. Moor, 459. Gro. Bliz. 486.

The cases which make a distinction between contracts by deed and by parol were before the statute 4 Geo. 2. c. 28; because unless the lessor had a reversionary interest in him, he could not distrain: but the statute says that where there is a reservation of rent, the party having a right by way of contract, has a remedy by way of distress. In Poultney v. Holmes (a) it is said, "where the lessee demises all his interest, re"serving rent, an action lies on the contract." That case was before the statute 4 Geo. 2. by which distress is incident whereever a rent is reserved. Blackstone J. in his commentaries (b) says, the intention of the statute was to put all rents on the same footing.

SHITH against MAPI.E-

As this agreement therefore was no surrender of the lease, because rent was reserved; as the rent of 81. 10s. to be paid annually over and above the 311. 10s. must mean so much to be paid per annum at the same times as the original rent was reserved: inasmuch too as an action would have lain on the contract before the statute 4 Geo. 2. and since that time the party has a remedy by distress, Sellon had a right to distrain for the whole rent. But if the court should be of a different opinion, at least he had a right to distrain for the rent in the original lease; there is an avowry for the quarter's rent; and the question reserved is, whether he is entitled on either of these avowries.

Rous in reply was stopped by the Court.

Ashhurst, J. It is not necessary to determine whether this agreement amounts to a surrender of the whole interest, or is to be considered as an under-lease only; though if it were necessary, I should say it was intended that the premises should be assigned for the whole term. But even supposing it is not so, and that it was only intended to be a demise from year to year, we must necessarily give judgment for the plaintiff; because first, I am of opinion that the 8l. 10s. at all events was reserved annually, and not by way of rent; but was intended to be a payment of a sum in gross. For the plaintiff was to hold on the terms mentioned in the lease, and to pay 8l. 10s. over and above the rent annually reserved towards the good-will: that in my apprehension does not mean a sum to be paid as a rent, but a sum in gross.

But even if it were reserved as rent, yet it is reserved annually; therefore it could not be due till the end of the year, and the defendant had no right to distrain till that time. Then the year not being at an end, only a proportion of it

could be due.

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The plaintiff in his plea in bar says the rent was not in arrear; and it was not so; because if the original lessor were tenant to the lessee under this agreement, yet as having an interest in the premises, Sellon was to pay rent to the plaintiff. The consequence is, that the plaintiff has a rent in his own hands; that balances the rent claimed; and then there was nothing in arrear.

BULLER, J. I am satisfied that this was intended to be a surrender of the whole term. The lease came into the hands of Sellon by assignment, and Smith wished to have it again. And there is no colour to say that Smith only wanted it for a particular period of the term; for when the agreement says he shall have it on the terms of the original lease, it means

for the whole term.

Then as to the 81. 10s. that is the consideration, on which the surrender is made, to be paid towards the good-will. Sellon had paid a sum of money in gross in order to get the assignment of the lease. Instead of taking back that sum which he had paid, he agreed that he would receive it back again by annual payments. As it is not expressed on the face of the agreement from what time the payment of the 81. 10s. was to commence, it must be taken to mean from the time when the agreement was made. Supposing it paid in the middle of a quarter, it cannot be applied to rent; because it was to be paid for the good-will from the time of the agreement. doubtful cases where the parties express themselves inaccurately, the courts will expound their contracts according to their intention. And it is a maxim in law so to judge of contracts as to prevent a multiplicity of actions; therefore this must be taken to be a surrender, in order to prevent two actions instead of one. For if Sellon were to recover against Smith, the latter might recover upon the lease against the former, which would be absurd. And it is on that ground, that the courts have construed express words of covenant into a release. As supposing the obligee of a bond covenanted that he would not sue on it, the courts say that shall operate as a release; for if it operated only as a covenant, it would produce two actions. So here it being clear that Smith was to have the lease back again, it operates as a surrender; and Sellon cannot recover any more than the 81. 10s. which is to be paid annually as a sum in gross; and therefore he is entitled to an action of assumpsit to recover that sum.

Postea to the Plaintiff.

CHURCHILL

### CHURCHILL against WILKINS.

1786. Friday, Nov. 17th.

HIS was an action upon the case, tried before Eyre, Where the Baron, at the last summer assizes at Oxford, in which contract dethe plaintiff declared upon a special agreement to buy of the was, that defendant all the fat or tallow which the defendant should have the defento dispose of for 12 months, from the 31st of July 1784, at dant should the price of 4s. per stone. There was a second count, stating the plaintiff the agreement to be, to deliver the fat or tallow at the price all his tallow of 4s. per stone, and two gallons of gin to be delivered at at 4s. per Christmas; with general counts.

The agreement proved was, That the plaintiff was to give proved was 4s. per stone, and if he gave any other person more, he was to that the degive the same to the defendant. Upon which Eyre, Baron, be should deling of opinion that this was a material variance, nonsuited the should deliver it at 4s.

plaintiff.

Phimer shewed cause against a rule which had been obtain- und so much ed for setting this nonsuit aside. In order to maintain this more as the action, the plaintiff ought to have stated in his declaration the to an: other entire contract; but he has omitted to set forth a most essenti-person; this al part, namely, the whole consideration of the promise, which was held a is now only partially set forth. Whether it would or would fatal varinot have been necessary besides to aver performance, is not at present material to be considered. If it had been stated generally, that the defendant undertook to deliver to the plaintiff all his tallow, without expressing any consideration at all, it would have appeared to be nudum pactum, and therefore void. Then if it were necessary to set out some consideration, it must be equally as necessary to set it out truly: for if the consideration proved is different from that which is laid, it is a fatal variance. The declaration should have stated the whole consideration, and then have averred that the plaintiff was ready to have paid the 4s. per stone, and so much more as he had given to any other person. For, if in fact the plannaff had given more to any other person, that would have been a substantial defence for the defendant, which upon this occasion he was precluded from going into.

As to Ughtred's case (a), the distinction there taken was between conditions precedent and subsequent, and what has necessary to be averred; but that case does not say that the good requisite to set out the whole contract. In Cr., Eliz. 848, where the declaration, after stating that in consideration that the

e, Where the h contract declared upon was, that the defendant should deliver to the plaintiff all his tallow tat 4s. per stone; and the contract proved was that the defendant eshould deliver it at 4s. per stone, and so much more as the paintiff paid to more as the paintiff paid to an other person; this h was held a distal vari-

CHURCH-1Lb against Wicking

the plaintiff would pay a sum of money, the defendant undertook to surrender a lease, only averred a tender of the money without going on to say that it was either refused or accepted, the averment was held ill.

Bower and Abbot, contra. The question is, whether this is a disjunctive contract? Here is enough set forth in this contract to shew the plaintiff's title, and that is all that is necessa-There was no precedent condition. 1 Lutw. 249. Doctr. Pl. 91. Where two considerations are in the alternative, the party who is to perform is at liberty to elect, and need only set forth so much as gives him a right to sue. In Laton v. Pearce (a), the plaintiff who sued for a penalty under the lottery act of 17 G. 3. c. 46. declared as upon an absolute agreement for 201. The fact was, that the contract was in the alternative, either to take 20% or an undrawn ticket in the lotterv; but the election was in the party sued. There Lord Mansfield said, that if the option had been in the plaintiff, and he had elected to take the 201, the contract would have been sufficiently stated, because he would thereby have converted the agreement into an absolute contract for the payment of the money; and then the other part of the alternative in the original bargain would become surplusage. Here it was in the power of the plaintiff to elect whether he would give more than 4s. per stone to any body else; and having elected, he reduced the contract to a certainty; and then the whole is set out, and there is no substantial variance between the contract laid, and that proved. If a contract be variable upon a contingency which does not happen, the original contract becomes absolute.

This case may be considered in another view. The contract in effect is, that the plaintiff will buy of the defendant all the tallow at a certain price, provided that, if he gave more to any body else, he would give the same to the defendant. Then how is the defendant precluded by this declaration from entering into the nature of his defence? It is enough for the plaintiff to shew that part of the contract which he is to perform, and upon the trial the defendant may take advantage of the proviso by way of defence.

As to the cases which make a distinction between conditions precedent and subsequent, they are not applicable to the present; for here nothing more was to be performed by the plaintiff. He could not have proved that he had not paid more than 4s. per stone to any other person; therefore it was not necessary to allege it, because it would have been averring

n negative.

ASHHURST.

ASHBURST, J. This nonsuit is proper. It was incumbent on the plaintiff to state his case truly. But the contract, as stated, is different in sense from that which is proved. For a Churchcontract, that the defendant shall deliver all his tallow at a particular price, is not the same as a contract, that he shall deli- Wilking. ver it at that price, or at a greater, on the happening of a particular event. The plaintiff should have stated the whole, and then have averred that he had not given more than 4s. per stone to any other person, and that he was ready to have paid that sum.

1786. against

As to the case of Laton and Pearce, it does not appear to

me to contradict that principle.

BULLER, J. I wish to have an opportunity of looking into the case of Laton and Pearce, before I finally decide this. But laying that out of the question for the moment, (for I think it will not be found to apply,) this case admits of no difficulty.

This is an action on a special agreement. The agreement is the gist of the action, therefore it must be stated truly. And this does not clash with the principle drawn from the cases cited by the plaintiff's counsel, which says that the plaintiff need not set forth different parts of an agreement which are not essential to the right of action; for here the contract proved is different in substance from that which is alleged. For the declaration states, that the plaintiff was at all events to pay only four skillings, whereas the contract proved was, that he was to pay so much or something more, as events might happen. They differ therefore in this respect; the agreement stated in the declaration is for a particular price absolutely, whereas that proved is for the sum stated in the declaration, or some other price conditionally.

This is not the case of an alternative contract, where the party has his option to do one thing or another; But it depends upon a contingency, because according to some future event it is a contract for a greater or a less sum.

the term alternative is improperly used here.

Neither is this like the question in Ughtred's case. the question here is, whether the plaintiff must not state the contract as it is? and whether he can state a contract as absolute, when whether it is absolute or conditional depends on the event of another fact.

I will look however into the case of Laton and Pearce, and if it makes any difference in my opinon, I will mention this Kule discharged. case again.

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#### CASES IN MICHAELMAS TERM.

1786. CHUECHagainst WILKINS

On the next day Buller, J. said that the case of Laton and Pearce was rather against the plaintiff than otherwise; for the court in that case held the variance to be fatal. But he observed that that was an alternative contract.

Saturday, Nov. 18th.

# The KING against SAMUEL HAWKSWORTH.

An unstamped agreement to sell a share of a ticket in the lottery before the tickets are deposited with the ers, is withty inflicted by the 21st section of

3. c. 47.

NONVICTION on the lottery act 22 Geo. 3. c. 47. By the 15th section of that act, the more effectually to prevent abuses in the selling of the shares of lottery tickets, it is enacted, " that the commissioners shall establish an office " in the city of London or Westminster for the deposit of tick-" ets intended to be sold in shares, and every ticket in any " such lottery as aforesaid, before it shall be divided into, or " sold in shares, shall be brought to the said office, and shall " be there deposited and left with the receiver-general of his commission-" majesty's stamp duties."

By the 16th section, "every agreement for the sale of a in the penal-" share of any such ticket or tickets, so to be deposited as afore-"said, shall be expressed on a piece of written or printed pa-" per, vellum or parchment, and shall be impressed with the 22 Geo. " some mark, device, or stamp, to be from time to time pre-" scribed by the said commissioners for that purpose."

> And the 21st section inflicts a penalty of 50l. on any person, "who shall sell or agree to sell any share or shares of any "ticket or tickets in any such lottery as aforesaid, otherwise "than by a written or printed agreement on a piece of paper, "&c. stamped and marked, &c."

> The information stated, that on the 11th July 1786, the defendant being a lottery-office keeper, did by an agreement then and there made between the said defendant and one Mary Pais (the same agreement being then and there expressed on

> paper) sell to the said Mary Pais a share, to wit, one sixteenth part of a ticket in a certain lottery established by an act of parliament made in the 26th year of his majesty's reign entitled "an act for granting to his majesty a certain sum of money to "be raised by a lottery;" and that the said agreement was not impressed with any mark, device, or stamp, prescribed by the commissioners for managing the duties upon stamped vellum, parchment, and paper, contrary to the form, &c. whereby the said defendant forfeited for his said offence the sum of 50% The

The record of conviction then stated, that the defendant being summoned before the justices, pleaded not guilty to the charge, whereupon the justices proceeded to examine the said The King Mary Pais, who deposed that the defendant, on the 11th July 1786, kept a lottery-office at Charing Cross, and that she went on that day to the said office for the purpose of buying of the defendant one sixteenth part or share of a ticket in the lottery, &c. That the defendant agreed to sell her the same for the sum of nineteen shillings and sixpence, and did sell her the same accordingly. That the agreement by which the said defendant did so sell to her the said sixteenth part of a ticket in the said lottery was then in his said office expressed on unstamped paper, and by him the said defendant delivered to her the said Mary Pais. That she then paid to him the said 19s. 6d. for the said sixteenth part or share of a ticket, That the above-mentioned paper writing, being produced, was as follows: "By field and Hawksworth, Charing Cross, "received July 11th, 1786, the sum of nineteen shillings and " six-pence, being in consideration for one sixteenth share " of a lottery ticket in the ensuing English lottery, which I "promise to deliver to the bearer hereof on the re-delivery " of this receipt, before the drawing of the said lottery.

1786. against HAWKS-WORTH.

" For Self and Co. "Samuel Hawksworth."

· Whereupon the justices (no defence being offered) convicted the said defendant in the sum of 50%.

Bearcroft, for the defendant, objected that agreements for the sale of shares of tickets, before such tickets are issued, are not required by this act to be upon stamped paper. For the 15th section of the act requires (among other things) that all tickets, before they are divived into shares, shall be deposited with the commissioners appointed by that act. Now by the following section, on which this conviction is founded, it is required that every agreement for the sale of shares of suck tickets, so to be deposited as aforesaid, shall be stamped. agreement therefore does not come within that description. Because it does not appear that at the time that this agreement was made, the tickets were issued or deposited, and the act only attaches upon agreements made for the sale of shares of such tickets so to be deposited.

Neither is this the sale of a share of a ticket within the 21st section; because this is only an agreement for the sale of a

share

agrinet HAWES-WORTH.

share of a ticket generally and not of a specific ticket. But the penalty can only attach upon the sale of a share of some The Kino particular ticket numbered. Therefore this is neither within the spirit nor the letter of the statute.

Erskine, contra, was stopped by the court.

Ashhurst, J. The construction contended for by the defendant's counsel would be a total repeal of this act of parliament. It was passed in order to prevent a multiplicity of shares being sold before the tickets were delivered; for before the issuing of the tickets, the lottery-office keepers might have contracted for the sale of tickets to a large amount, when in fact they were worth nothing; this was the very evil which the act intended to remedy. The legislature therefore directed, that the tickets should be deposited before the officekeeper should sell at all. And the deposit of the ticket is a security to the purchaser. But if it were permitted to sell shares of any tickets before they were delivered out, a man might practise with impunity every fraud which the act was intended to prevent. Therefore this is not a construction against the spirit or letter of the act.

BULLER, J. Nothing can be more express than the words By that, no share can be sold or agreed of the 21st section. for but on stamped paper. Therefore it is immaterial whether this agreement was before the delivery out of the tickets

or afterwards.

By the 15th and 16th sections two things are required to be done, that the tickets shall be deposited, and that the shares shall be stamped: the defence set up is, that because the defendant has offended in both these particulars, that he ought not to be punished for either. According to the true construction of the statute, all tickets are within it. If a party sell a share without depositing the ticket, he is guilty of an offence within the act; and if he sell a share on unstamped paper, he is likewise guilty. Then the words " so to be deposi-ded," in the latter section, must mean any tickets which by the act are directed to be deposited.

Conviction affirmed.

## The KING against DOWNES.

1786. Saugday, Nop. 18th.

all the is-

E IGHT issues were joined on the pleadings on this infor. Where any mation, which was in the nature of a que warrante calling one of sevemation, which was in the nature of a quo warranto calling one of seveon the defendant to shew by what title he exercised the office a quo warrante of Bridge-master of the borough of Bridgenorth. At the trial, to informatisix of them were found for the defendant, and the two last, on is found which were on the election and admission of the defendant, secutor, on were found for the prosecutor.

A rule having been obtained to shew cause why the master ment of ousof the Crown Office, in taxing the costs in this cause, should ter is given, not be directed to disallow the costs, on account of the six is-to costs on

sues found for the defendant. Bearcroft, Caldecott, and Simeon, now shewed cause, and sues. contended that it had been the constant practice to allow costs to the prosecutor on all the issues on que warrante informations, if judgment were given against the defendant on any That no authority could be found contradicting this That in the case of the King v. Dunning (a), where on the trial of a *quo warranto* information, seven issues were found for the defendant, and two for the prosecutor, a similar application had been made, which was refused by the Court; and the costs were allowed to the prosecutor upon all That under the 9 Ann. c. 20. there is no appointment of costs; and if judgment of ouster be given against the

on all the issues. Bower, in support of the rule. A quo warrante information has of late years been considered in the nature of a civil A prosecutor is only entitled under the 9 Ann. to costs in the same cases as the plaintiff in a civil action is under the statute of Gloucester (b). And it has been the invariable rule to allow costs to a plaintiff in a civil action on those issues only which are found for him. Astley v. Young, 2

defendant, the prosecutor is entitled under that statute to costs

The statute of the 4 Ann. c. 16. is not applicable to this case where the pleas are single; for that only gives the whole costs on double pleas where the plaintiff recovers upon any one of thom.

There is no analogy between this and civil proceedings. In doubtful cases, the practice which has uni-WOL. I. formly

(a) M.M.G. B. B. R.

(b) B Hd. 1. s. 1.

formly obtained in the Crown Office since Queen Anne's time is sufficient to decide this question; and therefore the prose-The Ki o cutor is entitled to costs on all the issues.

against

Rule discharged.

Tuesday. Nov 21st.

DOWNES.

#### DYCHE against BURGOYNE.

Judgment ed for want of a plea at 24 bours from the time of the

ded (a).

DUNNINGTON shewed cause against a rule which had may be sign- A been obtained by Gibbs, why the proceedings should not The irregularity complained of be set aside for irregularity. any time after was, that judgment was signed on the morning (b) of the day after the plea was demanded.

The cause shewn was, that the judgment was not signed till

plea deman-24 hours after demand of the plea.

In support of the rule it was contended, that this could not be done until the opening of the office in the afternoon, before which a plea had been delivered.

The rule is, that judgment may be signed for want of a plea at any time after twenty-four hours from the time of the plea demanded. Rule discharged.

But the Court gave the defendant leave to plead, upon payment of costs.

(a) Provided the time for pleading be expired. Bowles v. Edwards, p. 4. vol. 118.

(b) This objection was probably founded on the case of Southerton, one, &c. w. Greenfield, Barnes, 4to edit. 266.

Tuesday. Nov. 21st.

## SHETELWORTH against NEVILLE.

A plea by an 👚 EBT on two honds, made by the defendant's father; the heir at law, first of which, dated 31st March 1756, was in 80% and who was sued by an the second, dated the 15th of December 1775, was in 480%. obligee of Pleas; 1st, The general issue. 2d, Nothing by descent. his ancestor, 3d, A bond given to the defendant by his father on the 22d that he of August 1785, for 136l. conditioned for the payment of 68l. claimed to retain a cer- and interest, and that there is now due for principal and intetain sum for rest 701. 10s. The plea then stated, That the defendant had money laid not any lands or tenements which were the lands or tenements out in reof his father by hereditary descent in fee simple from his fa-Pairing the ther, except a certain messuage or dwelling-house, with the premises, cannot be appursupported.

455

SHE EL-WORTH against Neville.

appurtenances, erected by his father in his life-time upon a certain piece or parcel of ground, situate and being in the parish of Tolleshurst Beckingham, in the county of Essex, and now in the tenure or occupation of the defendant; and also except a certain wind-mill, with the appurtenances, purchased by his father in his life-time, situate and being in the same parish, and now in the tenure or occupation of the defendant; which said lands and tenements are, in the first place, subject and liable to the payment and satisfaction of the said sum of 701. 10s. so due and owing to the defendant upon the said writing obligatory as aforesaid; and also to the payment and satisfaction of a certain other sum of 1001, laid out and expended by the defendant, since the death of his father, for, in, and about, the repairing of the said wind-mill, with the appurtenances, over and beyond the amount, of the rents, issues, and profits thereof. 4th, That there were no assets except the said messuage and wind-mill, which were first subject to the payment of 701. 10s. for principal and interest due on the bond to the defendant. 5th, That there were no assets except the said messuage and wind-mill.

To the third plea there was a general demurrer, and join-

der in demurrer; on which the present question arose.

Gibbs, in support of the demurrer. The question is, Whether the heir is entitled to retain for the repairs mentioned in the third plea against the bond-debt due from his ancestor?

An heir cannot by his own act raise a charge on the estate in his own favour which shall supersede the incumbrances of his ancestor. The present defendant took this estate subject to the claims of the specialty creditors of his father. He has no more claim against a creditor by bond for an allowance of this sort, than against a mortgagee out of possession who brings an ejectment; for a mortgagee would be entitled to recover the possession, not subject to any improvements made by the heir. There is no difference between such an action and the present, since the fruit of the judgment, namely, the execution, is in effect the same. The defendant in the present case claims an allowance, because the repairs have exceeded the rents and profits: but supposing the excess had been the other way, the obligee could not have recovered them in this action. And therefore whatever the defendant may have expended in repairs, the loss must fall on him. The plea goes only to the time of pleading. And if the plaintiff should recover in this action, the heir will receive the rents and profits between the times of pleading and of exe-

1786. SHETEL WOLTH against

This shews that the plea cannot be supported on any principle of justice; for the defendant admits, that he has only a claim for the excess of the repairs beyond the rents, and yet will continue receiving the rents till the execution, NEVILLE, without making any allowance.

> There are also particular objections to this plea in point of form. It is perfectly new, which affords a strong argument for saying that it cannot be supported, as the same circum-

stances must have frequently occurred.

Though an executor may plead payment of a simple costract debt before notice of a specialty, yet the defendant in this case has not pleaded that he made these repairs before notice of the plaintiff's claim.

Neither is it stated that these repairs were necessary: they

might be ornamental only.

Again, it appears that all the repairs were made on the wind-mill alone: but the plea states that the repairs exceed

the rents and profits of the whole estate.

Wood, contra, admitted that this was a new plea, but he contended that on principles of equity it might be supported. As to one of the formal objections, that it is not stated that this money was laid out in necessary repairs, that has no weight. because repairs, ex vi termini, must mean necessary repairs; and ornaments cappot be included under that description.

There is no doubt but that the heir-at-law, being a bond creditor, is entitled to a preference in respect of his own bond debt; and he is liable no further than the value of assets. And where an heir-at-law has paid a bond debt to the value of the lands descended, it is a good plea. Here the heirat-law is merely a trustee for the benefit of the bond creditors; and therefore, considering him in that light, he is entitled to all just allowances; and if he had expended any money upon the premises, it would have been allowed him in equity. Supposing this estate had been devised to the heirat-law for the payment of debts, and he had expended this money in necessary repairs upon the premises, he would have been entitled to have pleaded the matter in bar. that this is not a devise to a trustee for the payment of debts, but the law has appropriated this estate in the hands of the heir for the purpose of paying debts; and there is no difference, whether an estate be devised to, or whether the law casts it upon, the heir for the same purpose. That is the case with respect to a guardian: if he lay out money in repairs, the Court of Chancery will allow them to him. So if a bond creditor

creditor were to extend the land which descended to the heir, and being in possession was obliged to lay out money in necessary repairs, the heir would be obliged to liquidate these Sheralexpenses before he could recover. Also where tenant by elegit has laid out money for repairs, he is entitled to retain the Neville rents and profits till he is repaid.

1786. WORTH against

Gibbs, in reply, was stopped by the Court.

ASHHURST, J. It is certainly a strong presumptive argument that this plea is bad, that it is the first time it has ever been attempted to be pleaded. But, on the reason of the thing, it is not good. And besides there are some defects in point of form.

First, it is not stated that these were necessary repairs. the heir-at-law were to be allowed all the money which he were to lay out in repairs, he might lay out more than was

necessary.

Again, it is not alleged that he had no notice of the plain-

tiff's demand before these repairs were made.

But a more substantial objection in point of reason in this case is, that the case of an heir-at-law is not like that of a trustee for the payment of debts. A trustee is not at liberty to apply the rents and profits to his own use; they must go in diminution of the just debts. But that is not the case with respect to an heir-at-law; for till the possession is recovered against him, he is entitled to the rents and profits; and he is entitled to receive them till judgment is given against him. In the mean time he may have received more than sufficient to pay for the repairs. Therefore I am of opinion that the plea is bad.

. Buller, J. What is decisive in this case is, that it is not stated that these were for necessary repairs. The word " repairs" is not a technical, definite expression; it may be used fraudulently. If the repairs were not necessary, it is undoubtedly bad. Therefore there is no occasion to go into

any other part of the case.

Judgment for the plaintiff.

1786. Wednesdays Nov. 22d.

The KING against The Inhabitants of FILLONGLEY.

WO justices removed, by an order, Mary Watson wi-Where a dow, and her five children, from the parish of Bedpauper rented a tene. worth, in the county of Warwick, to the parish of Fillongley; ment of 8/. a year in the which order was confirmed by the sessions, who stated the parish of A., following case:

and held 10e per ansum, in the adjoining parish of B. under a parol demise from his brother to bold as long wben be pleased, and distress. was to pay nothing for it; this is a suffiof a tenement of 10/. per annum under the 13 & 14 C. 2. c. 12.

That the pauper Mary Watson 16 years ago married Yohn another ten-Watson, who was born in the parisis of Fillongley. value of 21. said John Watson rented a farm of 401. a-year in the said parish of Fillongley, and about Lady-day 1783, being distrained upon for rent, he left the said farm, and came to the aforesaid parish of Bedworth with two cows and three sheep purchased for him by his brother out of the said distress. That about the said Lady-day 1783, the said John Watson took a house and three closes of land of the yearly rent of 81 in the said parish of Bedworth, and lived in the said house, and resided as the brother on the same for about three years; during which time the rent pleased, and was paid as follows; to wit, the first half-year by the said John again by bim Watson, the next half-year by the said parish of Fillongley, the third half-year by the said John Watson, and the fourth by a That about the said Ludy day 1783, Thomas Watson, in a conversation with his brother the said John Watson, concerning his family and poverty, said, " I am sorry for your " family, and therefore I'll give you a close in the parish of cient taking a Astley (an adjoining parish to the parish of Bedworth) con-" taining about four acres, to enjoy as long as I please, and " to take again when I please, and you shall pay nothing for "it." And the said John Watson enjoyed the said close, which was of the yearly value of 21. 10s. for three years, during which time the said Thomas his brother paid not only the land-tax, but was taxed and paid the poor's rates for the same. That all the tillage was done by the horses and servants of the said Thomas Watson, at whose expence and by whose servants the harvest was got in. That, during one year the said John Watson so enjoyed the said close, part thereof was sown with the wheat of the said John Watson, procured by the gleanings of his children and family; and in the last year the said part of the said close was sown with corn of the said Thomas Watson, at whose expence the crops of the said corn were drawn to and delivered at the house of the said John Watson, in That, during the said three the said parish of Bedworth. years, the cattle of the said Thomas were never put into the said

said close; except for the purpose of ploughing and sowing the land, and gathering the crops; but that the cattle of the said John Watson were upon the said close during the time he so The King enjoyed the same.

1786.

Mingay, Baldwin, and Gough, shewed cause against the rule The Inhabia for quashing the order of Sessions. This is not a sufficient FILLONG. taking of a tenement of 10% a-year within the meaning of the statute (a). Nor does the case of South Sydenham and Lamerton (b) apply to it, which was much relied on by the other side at the sessions; because here is no taking at all of the

21. 10s. per ann.

They admitted that there was no fraud in the case; but the pauper was a mere object of charity. It is absolutely necessary however that a man should be of sufficient ability to take a tenement of 101. per ann. otherwise he does not come within the statute; and upon this point have all the cases been determined. The tuking must be in some degree as a tenant: But this was merely a permission of the brother-to let him take the profits. For the brother continued in the legal occupation of the land the whole time. To admit this to be a taking would be to encourage fraudulent settlements.

Bearcroft and Willis, contra. No inconvenience can arise from the latter argument, because fraud must in all cases be expressly found by the sessions. But if fraud had been intended, it is more probable that there would have been a co-

lourable rent.

The statute only speaks of persons coming to settle upon a tenement of 10l. a-year; and takes no notice of the relative situation of landlord and tenant. Then the only question is, did this pauper come to settle on such a tenement? In South Sydenham and Lamerton, Lord Ch. J. Parker said, " the quan-"tity of the rent is not material, but the value of the land. "And if a man should, out of kindness, settle another in a te-"nement of 101. per ann. value, reserving no rent, yet that " will not alter the case." This case does not go quite so far; because it is only a part of the tenement which is enjoyed as a The mischief, which the statute intended to guard against, was vagrancy; but if a man is not likely to become chargeable, he is not to be removed under that act. present pauper therefore, being in possession of a tenement of 10%, per ann. value, was not likely to become so. In all the cases decided on this point, not the rent, but the value, has been held to he the criterion. Rex v. St. Matthews Beth-(nal Green (c). Rex v. Bilsdale Kirkam, (d). Rex v. Southwold (e). Rex v. Weston. (f).

The

<sup>(</sup>a) 13 & 14 C. 2. c. 12. (b) 1 Stra. 57. Bott. 356. (c) Burr. S. C. 574. (e) Ibid. 140. (d) Ibid. 828. (f) Ibid. 166.

The personal ability of the party is not material, and the matter of credit has never been considered as the substantive. The Kivo consideration. Here is an actual occupation by the pauper against. There was clearly a demise to him. He was liable, if called the tants of tants of pancy. And he was so far in complete possession, that he maintained treapass against all the world but his brother.

But even if some rent must be paid, this is to be taken as only one tenement, though lying in different parishes, and then in fact there was a payment of rent for a tenement,

which is stated to be of the value of 10% a-year.

ASHHURST, J. In all cases upon settlement law, it is the safest way to adhere to the words of the act. For if we sace depart from that line it leads to endless uncertainty. Now, taking it upon the words of the act, nothing can be more clear. They are, "that it shall and may be lawful, spon "complaint made by the church-wardens, &c. within forty days after any such person or persons coming to settle as "aforesaid in any tenement under the yearly value of 10L for any two justices, &c. of the division where any person or persons, that are likely to be chargeable to the parish, shall "come to inhabit, by their warrant to remove, &c." The act does not say any thing about ability. That is not the oriterion. And if the party comes to reside upon a tenement of 10L a-year, he cannot be removed, and then he gains a settlement by 40 days residence.

But if ability, or rather confidence, were to be taken into consideration, according to the case reported in Strange; yet if a man has sufficient credit and confidence reposed in his by another, as to be trusted with a tenement of 10L a-yes value, even out of charity, that is sufficient to answer she in tent of the statute, because such an one is not likely so be come chargeable. Therefore neither upon the words, me upon the meaning of the act, was this man removable, and

so he gained a settlement.

BULLER, J. It is admitted by the counsel in support of the order, that this is the first case which has come directly before the Court for a construction on this part of the statuse. I have no difficulty on this point, because I have often given it as my opinion, that the safest and wisest way in all questions relative to settlements is to adhere to the letter of the law. Greatening this shave arisen from departing from it. Now the words of the settle in a tenement of 10%, a year; who cannot be nominated

As to the question of fraud, I do not feel any force in that objection, because that question is open to the sessions in every case as it arises. Besides, it is the peculiar jurisdiction of the Teking justices, and not of this court, to say, whether the particular against case be fraudulent or not. If they do not adjudge it to be fraudulent, it is not competent for this court to say that it is. FILLOUG-I doubt whether in this case the order of sessions might not be founded on the idea that it was fraudulent. If they had said so, we should not have differed from them; but they have not found it so.

1786.

Next, as to the question of ability. It seems to me, that this idea is founded chiefly on the words of South Sydenham and Lamerton (a). But the words, if attentively considered, will not warrant the construction put upon them. For the credit which he has is only for the rent which he is to pay; but that is only as between him and the landlord; the credit is given by the landlord. Ld. Ch. J. Parker first says, " If a man hires a house " at a small rent, and pays a fine, yet if the house is worth 10%. " per ann. it makes a settlement, for the settlement depends on "the value of the tenement, not on the rent." Then indeed he uses these words, "The reason of the statute is this; that a " man who is entrusted with a tenement worth 10% a-year is " of such credit, and must have such a stock, as makes him not "likely to become chargeable to the parish. Eyre, J. took it " to be within the letter and intent of the law, that a man who " is capable of renting a tenement of 101, a-year should be set " tled in that parish." It is clear that they applied this reasoning to the persons mentioned in the former part of the act, to shew that that case did not come within the description. And this is put out of doubt by what Pratt, J. says; "The mis-" chief recited by the statute and intended to be prevented is "vagrancy of poor persons who used to come into parishes "where there was the best stock; and the statute describes who " are intended by those poor, to wit; such persons as are not ca-" pable of hiring a tenement of 10l. a-year." Now it is material to consider, what was the case on which the Court were then speaking. They were speaking of a case where the taking was of more than 10l. per ann. Therefore these expressions only relate to cases of above 101. per ann. The words of the Court are to be applied to the case then before them, and are not applicable to any case where the renting is not more than 10l. per ann. This is more decisive on account of what is said in the conclusion of the case; where, describing the poor persons whom the act intended to exclude from gaining settlements, Vol. I. Pratt,

(a) Mr. Justice Buller commented upon the case as it is reported in Bott. 356.

1786. Pratt. I. says, "such persons as are not capable of hiring "a tenement of 10% a-year." There are no such words in The King the act of parliament; but if we have recourse to the preamble, it speaks of rogues and vagrants, and persons who are TheI thabiburthensome to the parish. These therefore are the persons tants of of whom the statute speaks as likely to become chargeable, TILLONGand therefore the expressions in that case are only to be considered as particular instances of persons who from their situation in life were not likely to fall within the description of persons in the preamble of the act. But one who is settled on a

tenement of 10l. a-year is not within the act.

Then it has been contended that the pauper never had the tenement; but it is impossible for us to say so, after the justices have stated that he had it under an agreement, which made him tenant at will. For what is to become of the estate after he had sown it with corn? It's being gained by gleaning is not material; for suppose he had stolen it, it would have been just the same; he would have been entitled to the growing crop. He was then in possession of a tenement of 10% a-year, and could not have been turned out by his brother; therefore this is a sufficient taking of a tenement within the statute.

Order of sessions quashed.

Wednesday, Nov. 22.

guilty may

tion of debt

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on a penal

## COPPIN qui tam against CARTER.

Not guilty, HIS was an action of debt on the 10 Ann. c. 26. s. 109. pleaded to And the defendant having pleaded not guilty, the plainan action of tiff signed judgment, as for want of a plea, considering the debt on a penalstatute plea of not guilty to an action of debt as a nullity (a). On a motion to set aside this judgment for irregularity, is not such a nullity as which was opposed in the first instance, warrants judgment to be signed for want of a plea.

The Court said that this plea was certainly not a nullity. And indeed it should rather seem that this is a good plea (b): for as this is an action for an offence under a penal statute, the defendant by such a plea says that he is not guilty of the Whether not offence. Upon a devastavit against executors, not guilty may not be pleaded as well as nil debet.

ed to an ac-

At any rate, however, this plea is not a nullity (c); there fore the judgment must be set aside with costs.

Cowper in support of the rule. Erskine and Runnington against it.

(a) In Stafford v. Little, Barnes 4to edit. 257. the court held the plea of mil debet to an action on the case on a promissory note to be such a nullity as war-ranted the signing of judgment as for want of a plea.

(b) In Langley v. Haynes, such a plea was held good. Mo. 302. S. P. Go.

Bliz. 766.

(e) Vid. Theluson v. Smith, post. 5 vol. 152.

## KRETCHMAN against BEYER in Error (a).

7bursday, Nov. 23d.

THE defendant in error having recovered a judgment The plainagainst the plaintiff in the court of common pleas, the tiff, after plaintiff brought a writ of error, which was duly issued, al-and a writ lowed, and served. Afterwards the defendant in error became of error alea bankrupt, and his assignees sued out a scire facias quare lowed, have executionem non, reciting the recovery below, and the writ of a bankrupt, error.

Topping now shewed cause against a rule for quashing the nees cannot writ of scire facias issued to compel the plaintiff to assign er-scire facias rors, which rule had been obtained on the ground of the suit in their own not having been revived by the assignees since the bankruptcy, names to

The suit does not abate by the bankruptcy of the party, and compel an therefore the assignees were entitled to go on with it, which assignment of errors, they could only do by suing out a scire facias. He then cited till some Hewitt v. Mantel. 2 Wils. 372.

Shepherd, contra. There having been a proceeding since given: And the judgment, the suit ought to have been continued in the be done imbankrupt's name. A sci. fa. quare executionem non is not a new mediately suit on the judgment, but is merely a proceeding in order to after such compel an assignment of errors, and therefore a continuation judgment: of the same suit. Parker v. Stanton, 1 Str. 679. Knox v. Costello, 3 Burr. 1792.

Buller, J. This sci. fa. is wrong either way; first, as a sci. fa. quare executionem non, because it appears from the recital that a writ of error is depending. Secondly, as a sci. fa. to compel an assignment of errors, it is likewise wrong, even supposing it did not take notice of the writ of error depending, because there has been a proceeding since the judgment. And the rule is that the assignees cannot make themselves parties to the record in any intermediate stage of the proceeding, but it must be immediately after judgment; though an interlocutory judgment is sufficient for that purpose. Here the assignees should have gone on with the writ of error in the bankrupt's name till judgment. Therefore the scire facias must be quashed.

Rule absolute (b),

(a) Vid. post. 2 val. 45.

(b) Vid. part. 3 vol. 437.

1786. Tbureday. Nov. 23d.

#### FISHER against STANHOPE.

**Befendant** discharged out of the custody of because acknowin custody in the term in which he was charged

SHHURST, J. delivered the opinion of the court on a motion which had been made the preceding day, for taking the committitur off the file. The objection is, that the marthe marshal, shal's acknowledgment of the defendant's being in custody is not sufficient to warrant his imprisonment. We are of opithere was no nion that the acknowledgment ought to be of the same term in ledgment by which the defendant is charged in execution; and that an acthe marshal knowledgment two terms preceding is not sufficient accordof his being ing to the practice.

Rule absolute (a).

(a) Hartlein v. Duroure, Tr. 1785, B. R. cont.

Friday, New 24th.

but it does

not pre-

clude him

any objec-

tion to the

action be-

yond that sum; tho'

unless such

sum were

paid, such

objection would be a

har to the

in execution.

> COX and Another, Executors of SHULTZ, against PARRY.

O an action on a policy of insurance tried before Buller, I. Payment of at the sittings at Guildhall after last Trinity Term, the money into court is only defendant pleaded the general issue, and paid money into court. ah acknow-A verdict having been found for the plaintiffs, a new trial was ledgment by moved for on the grounds, that this was a verdict against evithe defendant of the dence; and that upon the construction of the 25 G. 3. c. 44. contract, the plaintiffs could not support this action in point of law, the and that the name of Shultz not being inserted in the policy. After arguplaintiff is ment, the court took time to consider of the case : and on this entitled to recover the day sum so paid:

Ashhurst, J. delivered the opinion of the court.

This is an action on a policy of insurance made in the name of Lyon de Simons, on goods and jewels on board the Hali-

from taking well from London to the East Indies.

This policy was made on the 23d December last; which being long subsequent to the passing of the statute 25 G. 3. the policy cannot by law be applied to any goods which were not the property of De Simons, or in which he was not interested (a). But the plaintiffs have endeavoured to make another use of it, and to apply it not only to the goods which were shipped in the name of De Simons, but also to goods shipped in the name of Shultz. And

whole demand. According to the 25 G. 3. c. 44. the name of the party interested must be inserted in a policy of insurance, otherwise he cannot recover upon it.

(a) Vide Pray v. Edie, aute, 813.

1785.

Cox

against

And in order to do that, they proved on the trial that Shultz ordered two policies to be made, one in the name of Shultz on goods and it wels for 1400/.; the other (which is the policy in question) in the name of De Simons, to the amount of 1600%. on goods and jewels; which policy was to be lodged in the hands of De Simons as a security for 1600l, which Shultz had borrowed of him. When Shultz borrowed the money of De Simons, he assigned over to him the jewels, which were shipped in the name of De Simons, and they were to be re-delivered to Shultz in the East Indies, upon his paying the principal and interest there. The jewels shipped in the name of Shultz are totally lost, but those shipped in the name of De Simons have been recovered. If the plaintiffs can apply the policy to the goods shipped in the name of Shultz, as well as to those shipped in the name of De Simons, there has been an average loss, and the verdict which the plaintiff's have obtain. ed ought to stand. If it cannot be so applied, the underwriters are liable only for the salvage of the jewels shipped in the name of De Simons; and, more having been paid into court. the verdict is wrong.

I have already stated, that by law the policy can only be applied to the interest of De Simons, the statute having made it void to other purposes. But a great question in the case is. whether the defendant has not precluded himself from making that objection by paying money into court. Therefore it will be necessary to see what effect paying money into court has in the cause.

It admits, that the plaintiffs have a right to maintain the action (a), and reduces the question simply to the quantum of damages which they are entitled to recover.

In this case, if the defendant had not paid money into court, the plaintiffs must have been nonsuited; for the executors of Shultz could not have recovered on a policy made in the name of De Simons only. But as the defendant has paid money into court, he has thereby admitted that the plaintiffs are entitled to maintain their action on the policy to the amount of that sum. But he has admitted nothing more. He does not, by paying money into court, vary the construction and import of the policy, so as to entitle the plaintiffs to recover beyond that extent.

The question still remains, whether upon this contract the plaintiffs are entitled to more. In order to ascertain that, it is incumbent on the court to examine and expound what the contract is. At the time it was made, it could only be good as an insurance on the goods which belonged to De Simons; it is made in his name; it is a good and valid contract as far as it respects

<sup>(</sup>a) Vide Elliot v. Callow, 2 Salk. 597, which agrees with this determination, & 5 Burr. 2640.

1786. Cox against PARRY.

respects his goods; but is void as to all others. And the plaintiffs shall never be admitted to say that this contract, though apparently legal, is in fact illegal, as being made for their benefit; and yet they mean to avail themselves of that illegality and to recover damages upon it.

Besides this, we think that (independent of the objection in point of law) the verdict is not supported by any fact of the evidence. The broker's evidence does not by any means prove that Shultz did not intend to make distinct policies upon the distinct goods shipped in his own name and that of De Simons.

On the contrary, the making of two policies, each according to the value of the goods which were shipped in their respective names, and the purposes for which that was done, namely, to lodge one in the hands of Shultz, and the other in the hands of De Simons, and the impossibility that they should by law take effect in any other way than as specific policies on the specific goods (which we are bound to presume Shultz knew,) are unanswerable proofs that he intended that the policies should have the effect which the law gives them.

The defendant underwrote the policy made in the name of De Simons only; and it does not appear that he knew or even heard of the other policy which was made in the name of Then the evidence of one of the witnesses stands wholly uncontradicted, and he says that De Simons (who is one of the plaintiffs) told him that this policy was made on the par-

ticular jewels shipped in his name.

On the whole, we are of opinion that this is a verdict both against law and against evidence; and therefore must be set **as**ide (a).

(a) Vid. Watkins v. Towers, post. 2 vol. 275.

**I**riday. Nov. 24th. DENN, on the several Demises of ANN GOODWIN, and GEORGE WRAGG, and ANN his Wife, against SPRAY.

A custom within a manor, that hds shall descend to the elder sister, where ther a son

THIS was an ejectment for copyhold lands lying in the manor of Bolsover, in the county of Derby. Three several demises were laid in the declaration, one by Ann Goodwin of one undivided third part; another by Wragg and his wife for an undivided third part; and another by them and Ann Goodwin there is nei- for two undivided third parts. This was tried at the last Derby

nor a daughter, does not extend to an eldest niece; but the lands must descend according to the rules of the common law, in default of such a son, daughter, and sister. A custumary of a manor, appearing to be of great antiquity, and delivered down with the court-rolls from stews ard to steward, although rot signed by any person, is good evidence to prove the course of descent within the manor (s).

(a) Vid. Roe de Beebee v. Parker, p. 5, vol. 26:

assizes, when a verdict was taken for the lessors of the plaintiff, subject to the opinion of the court on a case reserved.

DENM against SPRAY.

Joseph Stanley was seised of this copyhold estate, and died intestate, and without issue, leaving one niece, the above named Ann Wragg, and the representatives of two other nieces, who died before him, namely, the above named Ann Goodwin, only child of Mary his second niece, and the defendant Joseph Spray, the eldest son of Elizabeth his eldest niece; which three nieces were the daughters and only children of Thomas Stanley, who was the eldest brother of the said Joseph Stanley, and who died in his life-time. The defendant is now in possession of the whole estate, and claims to be heir according to the custom of the manor.

A parchment writing was produced by Mr. John Gladwin, the steward of the manor, as the custumary of the manor.

Mr. Gladwin had been steward for five years; he was clerk to Mr. Dakin his immediate predecessor, who became steward in the year 1748, and had the possession of the custumary all that time, and had received it from Mr. Robert Wilmot

the preceding steward.

The parchment writing bears no date, and begins thus—Bolsover—Cum de concilio domini regis ex assensu omnium tenentium et summonitorum manerii dicti domini regis de Bolsover de modo tenuræ suæ ad specialem rogatum inscriptis expresse ordinatum est, prout patet in sequenti, prout antecessores sui a tempore Gulielmi conquestoris tenere consueverunt; quæ çuidem scripta omnibus hominibus hujus manerii et hæredibus de se provenientibus in seculum remanebunt imperpetuum.

Art. 5. Item, omnes terræ et tenementa post mortem cujuslibet tenentis infra dominicum prædictum per Bedellum villæ debent sesiri et remanere in manu domini cum omnibus proficuis de se provenientibus, quousque proximus hæres satisfaceret domino regi 5s. 4d. pro relevio suo, et faceret fidelitatem in plena curia, quia nulla tenementa hujus manerii sunt partibilia nec inter hæredes masculos nec femellas.

Art. 13. Item, si aliquis tenens hujus manerii obierit, filius suus primogenitus et legitime procreatus habeat hereditamenta, et dabit domino regi 5s. 4d. pro relevio suo; et si contingat alicui tenenti quod non hubeat filium, filia sua ante nata habeat hæreditatem suam, absque partitione, præter dotem, et dabit domino regi 5s. 4d. pro relevio suo, sicut filius primogenitus faceret.

As to daughters, an entry was read from a court-book, dated the 17th of June 1734, by which it appeared that Ann, the wife of Joseph Williams, claimed in open court, as eldest

daughter

DENN against SPRAY.

daughter and beir of John Palmer, all such customary lands, &c. as descended to her on her father's death; to which she was admitted according to the custom of the manor, &c.

It was admitted that there were several entries before and after the above the eldest daughter and heir: and the plaintiff's counsel did not controvert the fact that the custom extended to daughters.

To show that the custom extended to sisters, another courtbook was produced, from which the following entries were

taken :

June 9th, 1646. Bolsover. The court of the manor of the Marquis of Newcustle, &c. The jury, sworn to enquire for the lord of the said manor, say as follows; 1st, That William Spring fellow, who whilst he lived held to him and his heirs of the lord of the said manor a messuage, and certain lands in Clown, by the yearly rent of 5s. 4d. fealty, and suit of the court, since the last great court held here died so seised thereof, and that Helena (wife of John Pinns of Mansfield) is the eldest sister and heir of the said William, and of

full age, whereby falls to the lord for relief 5s. 4d.

Then at another court, entitled Court Leet of the King, and Great Court of the Manor of the Marquis of Newcastle, 28th October 1646. At this court came Eleanor Pinns, wife of John Pinns, in her proper person, and here in full court humbly begs to be relieved out of the hands of the lord all and singular customary messuages, cottages, tenements, and hereditaments, in Clown, or elsewhere, within the manor, of which William Spring fellow her brother died seised, which after the death of the said William descended to her, jure hareditatis, according to the custom of the said manor; to which said Ellen, the lord, by his steward, grants thereof seisin by the rod, according to the custom of the manor aforesaid, to hold to her, her heirs and assigns, according to the custom of the manor of the said lord and his heirs, by the rents, &c. accustomed, and gives to the lord for relief 5s. 4d. and so is admitted tenant thereof.

It was admitted that there were three other entries as to the eldest sisters and not disputed, but that the custom ex-

tended to them.

As to nieces, there being no instances, the defendant's claim depends entirely on the before mentioned evidence.

The question is, whether the lessors of the plaintiff are en-

titled to recover?

Clarke,

Clarke, for the lessors of the plaintiff, after observing that, where no particular custom intervened, copyhold lands must descend according to the course of the common law, contended, 1st, That as there was no instance of any admission of an eldest niece, it would be incumbent on the defendant to shew that usage was not necessary to prove the custom. 2dly, that a custom cannot be extended by construction.

DENT against SPRAY.

As to the first; Custom is founded on long usage. In Co. Lit. 110. b. it is said, "of every custom there "are two essential parts, namely, time, and usage." To an information on the 5th Eliz. c. 4. for using a trade, the custom of London was pleaded, but held insufficient, because the defendant in this plea did not shew that it was used. 2 Bulst. 187. and there cited 22 E. 4. fo. 41. Custom must be prov. ed by usage. Sty. 480. Upon a return of a writ of restituttion, Glyn, Chief Justice, said, "Here appears no such cus-"tom upon the return: for the return is, that for such offen-"ces the parties have used to be removeable and discharge-"ble, which is merely imaginary and a thing in feri, and not "in facto, or in usage; for you have not shewn that it was at "any time put in practice." As well the existence of private customs must be shewn, as that the thing in dispute is within the custom alleged, 1 Bl. Com. 76. As to the case of Doe dem. Muson v. Muson (a), there was an instance of admission to prove the custom.

2dly, There is no instance of any admission to shew that the custom in this manor extends to nieces. Every custom which departs from the common law must be construed strictly  $(\bar{b})$ . Customs are not to be enlarged beyond the usage. Fitz. 243. Where lands in Borough English descend to the youngest son, and he dies without issue, they shall not go to the younger brother; for that custom doth not hold place between brothers. Cro. Jac. 198. The same strictness holds in lands in gavelkind. Dyer 310. It was held in 4 Leon. 242, that a custom, that eldest sisters should take, did not extend to eldest aunts or nieces. And in that case it was said by Coke Chief Justice, "That there are two pillars of "custom, one the common usage, the other that it be time "out of mind. And therefore, upon the evidence given to "the jury, the court enforced the parties, which maintained "the custom, to shew precedents in the court rolls, to prove "the usage; and he said, that without such proof, and that it Ppp had Vel. I.

(a) 3 Wile. 63.

(b) Co. Cop. 43.

DENN against

"had been put in ure, although it had been deemed and reported to be the true custom, yet the court could not give
credit to the proof by witnesses.

The custom, which is to alter the course of descent by the common law, can only operate from the person last seised. But *Thomas*, the brother of *Joseph* the person last seised, was never seised himself. And therefore the defendant can only claim under a niece of *Joseph*; and to nieces the custom does not extend.

Besides, the custumary itself was not admissible evidence: it bears no marks of authenticity. It was most probably written by the steward of the manor; and therefore is not conclusive against the tenants who were not parties to it.

But if it be admissible evidence, it can have little weight. In Mason v. Mason the court considered one fact of admission as equal to another fact of admission; and they laid no stress on the presentment by the homage. But the presentment by the homage in that case was undoubtedly better evidence than the parchment produced in this, and which seems to have been written without any fact to warrant it. The only words to support this custom are, "that the lands shall not be part-"ible either between heirs male or female." Now a prescription merely in the negative is bad. 2 Ro. Abr. 270. 11 E. 4. 2. b. 18 E. 4. 3. b. and 8 H. 6. 4. there cited. There should be an affirmative mixed with it. Therefore the 5th article, which is only in the negative, is bad. But the 13th article, which is in the affirmative, is good; and that explains what is meant before by "heirs male and female," and confines it to "eldest sons and daughters."

Romilly for the defendant. It appears, as well from the custumary as from the admittances stated in this case, that there is a custom in this manor, that where a man dies seised of lands within the manor, leaving several females, who by the common law would be his co-heiresses, the eldest of those

females or her representatives shall inherit.

The objection which has been raised against the custumary because not admissible evidence is rather extraordinary; since no objection was made to it at the trial, and it was stated by both parties in the case, it being intended to form a part of it. That objection is founded on the case of Ratcliff v. Chapman, as reported in Leonard: but that is merely a dictum, and of no authority; and the custom in that case was established notwithstanding the dictum, and notwithstanding an instance was produced against it. Besides, that case is reported

in other books (a), and no mention is there made of this point. The doctrine as to the proof of the custom laid down in that case would be productive of great inconvenience if not absurdity. For the custom in that case was, (he contended) as in the present, general for all co-heirs. Now such a custom could not be proved by instances, because it could not be established without proof of instances of every possible case. Evidence must have been given of daughters, sisters, aunts, nieces, cousins, &c. in infinitum; for if one possible case of co-heirs were not proved by an instance, the deduction would not be complete, and the custom could not be established.

1st, As to the custumary. The fifth article, " that no te-"nements of this manor are partible either between heirs " male or female," is couched in terms best calculated to express a custom extending to all co-heirs. The 13th article says, "if a tenant have no son, his eldest daughters should " have his inheritance without partition, except dower." And the instances of the admittance of the eldest co-heirs stated in the case leave no uncertainty; for it appears from them, that the custom is that the eldest of the co-heirs shall succeed to the whole tenement. It is objected that these two articles are inconsistent, and that therefore the fifth must be rejected, and the custom taken from the 13th: but they are not inconsistent; for the eldest son and eldest daughter in the latter are only particular instances of the heirs male and female in the former; and the custom there stated cannot be considered as confined to sons and daughters only, since there are instances of sisters. But at all events this custumary ought to receive the same construction as all other written instruments, namely, such an one as will give effect to all the words. The whole should be taken together as forming one general custom.

But if there be any doubt on the custumary itself, the admittances stated in the case entirely remove it. The custom is either confined to daughters, or it extends to all collateral heirs: now the instances of sisters shew that it is not confined to daughters; therefore it must extend to all heirs. It is material to observe, that no instances are stated against the custom; and therefore it must be taken upon this case that no instances are to be found in the court rolls of several co-heirs being admitted as coparceners to any tenement. Likewise, as there are no instances on either side it is clear that it has never happened, since the time from which the court rolls are

extant,

Dann against

<sup>(</sup>e) Godb. 166. 2 Ro. Rep. 368. 1 Ro. Abr. 623. A. 1.

DENN against

extant, that any tenant has died leaving any other co-heirs than daughters or sisters: to require therefore the instance of an eldest niece being admitted is to require an impossibility. And when it is considered that these customs are always confined to very small districts, it is manifest that the necessary consequence of requiring proof of these customs by particular instances must be to abolish almost all of them.

But if the court think that the custumary ought to be wholly disregarded, it appears from the admittances alone that the defendant is entitled to all the premises, as heir, according to It is admitted that the custom extends to an eldest sister: now an eldest niece falls within a custom for an eldest sister to inherit. He admitted that this position was only supported on principle and by no authority, and that there is even a dictum in Ratcliffe v. Chapman, as reported in Leonard, against it; but it is merely a dictum, and is not mentioned in the other reports of the case (a), for in them it is stated to have been held that a custom for the eldest daughter will not extend to the eldest sister or aunt. There seems to he a clear distinction between extending a custom for the eldest of any lineal heirs to inherit to collateral heirs, and extending a custom for the eldest lineal heir to inherit to lineal heirs more remote, or for the eldest collateral heir to collateral heirs more remote. All the cases shew that the court will not do the former: But there is no authority against the late A case in 1 Ro. Abr. 624. pl. 2. seems to warrant this It is not to be disputed but that the issue of the distinction. persons named in the custom will take under it; for in all these customs the jus representationis takes place as well as in descents by the common law. It has been so held in gavelkind tenure. Clements v. Scudamore (b). So in gavelkind, a custom for brothers to succeed equally to the tenement of their brother extends to nephews jure representationis (c). So in a custom like the present. Godfrey v. Bullock (d). the case of Borough English. Clements v. Scudamore. the principle of that case it is clear that if a man, seised of lands in Borough English, have two sons, and the youngest die in his life-time leaving two sons, and then the tenant dies. his lands must descend upon the youngest son of the young est son, that is to the representative of the youngest son; for if they descend to the eldest grandson as his representative, there

<sup>(</sup>a) 2 Rol. 361, Co. Copyb. 84. (c) Som. Gavelk. 7.

<sup>(</sup>b) 1 P. Wms. 63. (d) 1 Rv. 4br. 623, pl. 3.

agninet SPRAT.

there would be this absurdity, that he would take as well by the custom as against it. It is almost equally absurd to say, that a niece cannot take under this custom for the eldest sister to inherit: because in some instances the nieces must inherit. As if A had three sisters, each of whom died in his life-time, leaving a daughter, the inheritance would descend to the eklect sister's daughter. There is a great difference between a custom of this kind, and one for which no reason can be assigned; in which latter case the court have construed it strictly, lest by exceeding the letter of the custom, they should determine against the spirit: but there might be a good reason for the custom, in the present case, that the lands shall not be partible; because if they were, the tenants might not perhaps be enabled to perform the lord's service.

Carke in reply. The cases cited tend to support the argument urged for the plaintiff; because they shew that a custom can never be extended. For in the cases where children take by right of representation, they take by common law, and not

by custom.

The custumary is merely evidence of reputation, which cannot establish a custom, because there is no instance to support it. Therefore the usage ought to have been shewn.

Cur. adv. oult.

And on this day, Ashhurst, J. delivered the opinion of the Court. After stating the facts—A doubt was made, whether this parchment was admissible evidence, not being properly a court roll: But we think the evidence was very proper to be received. It is an ancient writing found amongst the court rolls, and delivered down from steward to steward. It is stated to be ex assensu omnium tenentium. It could not well be supposed to be the interest of any of the tenants to fabricate it; for it was competent to any of them by his own act to do that which the custom is made to do for him: so acitater could the lord have any interest. Therefore it is certainly admissible evidence.

The words are, that the next heir shall satisfy to the lord s. 4d.; be cause no tenements are divisible, either between

heirs male or female.

But then the question is, who is this customary heir? The 13th article shews who shall be deemed such in the immediate course of lineal descent. And to shew that this has obtained in practice, the court roll 17th June 1734, was given in evidence, which proves the admission of Ann Williams (formerly Ann Palmer) as eldest daughter and heir of John Palmer.

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Palmer. Then to shew that the custom does not stop there. but that it extends to collaterals, the court roll 9th June 1646 was given in evidence; by which it appears that William Spring fellow died seised of a tenement held of the manor, and that Helena (wife of John Pinns) was admitted as eldest sister and heir of the said William; and there were three other entries to the like purpose.

But then, as Thomas Stanley, the brother of Joseph, (and who would have been his heir had he survived him,) died in the life-time of Joseph, the question is, to whom the estate shall go in right of representation to Thomas?

Now it seems to be a first principle in regard to copyholds, that custom is of the very essence of a copyhold; and if the custom be silent, the common law must regulate the course of descent. Ld. Coke says, in the case of Ratcliffe v. Chapman (a), "that there are two pillars of custom, one the common " usage; the other, that it be time out of mind;" and therefore he says, "upon the evidence given to the jury, the court " enforced the parties, which maintained the custom, to shew " precedents in the court rolls, to prove the usage, and that " without such proof, and that it had been put in ure, (al-" though it had been deemed and reputed to have been the "true custom,) yet the court could not give credit to the "proof by witnesses." Now here there is no proof at all in the court rolls, as to the course of succession in the collateral line, further than the case of a sister. And it is expressly haid down by the court in 4 Leon. 242. in the above case of Ratcliffe v. Chapman, that where the custom is that the eldest sister shall inherit, yet by that custom the eldest aunt or the eldest niece shall not inherit the land. That this is the law in regard to collaterals is further proved by the case in 1 Rol. Abr. 624. pl. 2. where it is said, that if the custom be that the youngest son shall inherit, and a man has issue two sons and dies, and the land descends to the youngest son, who dies without issue, the eldest son of the eldest brother shall have the land; because the custom does not hold in the transversal line, but only in the lineal descent. These two cases therefore seem in point in favour of the plaintiff.

Another argument in favour of the plaintiff seems to arise from the particular penning of the custom, (as it appears in the 13th article,) which is the only piece of evidence prescribing the rule in the course of descents; and that says, si aliquis tenens hujus manerii obierit, his eldest son, or (if no son) his eldest daughter shall inherit. Now the defendant's grandfather

(a) 4 Leon. 242.

father Thomas (under whom he derives his descent) never was a tenens manerii; and therefore the custom, as to the course of descent, never attached upon him. For these reasons we are of opinion that the lessors of the plaintiff are each entitled to recover an undivided third part of the premises in question. Postea to be delivered to the Plaintiff.

1786. DENN againes SPRAY.

SMITH and Another, Assignees, &c. of CLARKE a Bankrupt, against MILLES.

Friday, Nov. 24th.

THIS was an action of trespass brought by the assignees Trespass of a bankrupt against the defendant, who was sheriff of will not lie signees of a

the county of Hertford.

The first count in the declaration was for breaking and en-bankrupt tering the messuages, &c. of the plaintiffs as assignees, on the spainst a 23d Feb. 1786, and seizing and taking the deeds and writings, taking the household furniture, &c. (enumerating them particularly, ) of goods of 2 The 2d count was for seizing and taking the bankrupt in the assignees. goods, &c. of the plaintiffs on the 13th of March 1786. after an act

The defendant pleaded, 1st, the general issue; and 2dly, a of bankjustification under a fieri facias, sued out on the 13th of Fe-ruptcy, and bruary 1786, at the suit of one Caleb Atkinson, against the before the issuing of bankrupt, and delivered to him on the 21st of February 1786, the commis-Replication de injuria sua propria absque tali sion; notto be executed. withstandcausa.

This cause came on to be tried at the last assizes for the them after county of Hertford, before Lord Loughborough, when the the issuing plaintiffs proved a commission of bankrupt, dated the 27th of of the com-February 1786, against Clarke, on the petition of more than mission, and three creditors; and that the hankrupt of the time of include after a prothree creditors; and that the bankrupt, at the time of issuing visional asthe commission, was indebted to one of them in the sum of signment 1611. They then proved the trading; and an act of bankrupt- and notice cy on the 1st of February 1786. They also proved, that on provisional the 23d of February 1786, and not before, the defendant, as assignee not sheriff of Hertford, entered the dwelling-house of the bankrupt to sell. and there seized the several goods, &c. of the bankrupt, under Whether proof of a and by virtue of the said writ of fieri facias; that on the 28th debt of 1611. of the same month of February, Clarke was declared a bank- to one of the rupt, on which day the commissioners executed a provisional petitioning

rupt, on which day the commissioners executed a provisional creditors, assignment of the bankrupt's estate and effects to their messen-there being ger, whereof the officer in possession under the execution on more than the same day had notice; that on the 13th, 14th, 15th, and three, will 16th days of March, the said goods and chattels were sold by support the commission public of bankrupt.

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public suction under the aforesaid execution; that on the morning of the said 13th day of March, the said sheriff had notice from the aforesaid provisional assignee not to sell; that on the 17th of March the plaintiffs were chosen assignees, &c. of the bankrupt under the said commission, and that an assignment thereof was then duly made to them.

To this evidence the defendant demurred.

Russell, in support of the demurrer, before he came to the principal point in this case, observed that this commission was sued out by more than three creditors, who should have preved a debt to the amount of 2001 in order to support it. For though the debt which was proved by one creditor was sufficient to have supported a commission, which might have been sued out on the petition of such creditor, yet the debt proveding the present case did not support the commission as taken out.

But laying that entirely out of the case, the principal question is, whether trespass will lie at the suit of the assignes against the sheriff, who entered and seized the bankrupt's goods before the commission, but who sold them afterwards. To support this action the plaintiffs must prove that the defendant has been guilty of an unlawful entry, and taking of the plaintiff's goods. But this was not an unlawful entry, and taking at the time, because Clarke was not then a bankrupt, and it could not be known at that time whether he would ever be declared a bankrupt. Then it must be contended that the subsequent sale made him a trespasser by relation. was not a trespass, though his sale may be a conversion, and subject him to an action of trover. The distinction between the actions of trover and trespass, is fully taken in the case of Cooper and another v. Chitty and another (a): in which case Lord Mansfield said, that to subject a sheriff to an action of trespass the taking must be unlawful: and that persons who acted innocently could not be made trespassers, or criminal, by relation. In the present case these are only the goodsof the plaintiffs by relation. They may become their property by relation: but possession cannot have relation back; and possession is essentially necessary to support this action. of law may give a right, but cannot create a wrong: therefore the taking was not unlawful. Neither is it true that the defendant took the goods of the plaintiffs; for they were not chosen assignees till after the seizure.

He admitted that the sale subsequent to the notice was wrong, and subjected the defendant to an action of trover, but

(a) 1 Burr. 20. 1 Bl. Rep. 65.

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trespass. This is not like any of those cases, where persons have been deemed trespassers ab initio, by doing some act inconsistent with the original taking, as by working a distress (s) &c. for this sale is not inconsistent with the original taking: it is not an abuse of the authority of the law under which the defendant acted; and it is only by some collateral matter that the sale became unlawful.

But, however, if the selling be considered as a trespass, so as to render the defendant a trespasser ub initio, there should

have been a new assignment.

Shepherd, contra, was not aware that the first point was intended to be gone into, and said, he only came prepared to discuss the general question, whether the action of trespass was properly brought; insisting, however, that the debt which had been proved was sufficient to support the commission.

He contended, as to the principal point, that if there was not a sufficient property, or possession, in the assignees, to enable them to maintain trespass, there never could be a sufficient property or possession to enable any person to bring trespass, where a wrong-doer had got possession. The provisional assignment of the bankrupt's effects, which was made previous to the sale, was meant purposely to protect the goods, till the assignees were chosen; and the subsequent assignment vested the property in the assignees by relation, and gave a

tight coeval with the provisional assignment.

Wherever there is a general property in personalty, though the party has not got possession, an action of trespass will lie. An executor, after proving the will, may maintain trespass for taking the testator's goods before probate, of which he was never in possession (b). If a lord be entitled to a waif, or estray, within his manor by prescription, he may maintain trespass against a stranger without seizure (c). Trespass will lie against a stranger without seizure (c). Trespass will lie against a stranger by a person having a general property in personalty, without possession; because, in law, the property draws a possession after it (d). If the assignees cannot maintain this action, because they had not the actual possession, no person can; for the bankrupt himself cannot bring the action after bankruptcy. Therefore no tortious taking of a bankrupt's effects, after the bankruptcy and before the choice of assignees, can be punished.

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<sup>(</sup>a) Vide Oxley and Watts, ante, 12 and the cases there cited. (b) 2 Bulst. 263. (c) F. N. B. 91. (d) Bro. Tit. Trespass, pl. 303.

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He admitted that where a sheriff sells, after an act of bankruptcy committed, without notice, he is not subject to an action of trespass: but, if he sells after notice, he assents to the original trespass, and makes himself a trespasser, ab initio. Where a distress is taken for damage feasant and the party afterwards abuses that distress, yet he is deemed a trespasser ab initio, although the first taking were lawful. So in the present case the sheriff took possession innocently at first, though not legally, because the goods were vested in the assignees by relation from the time of the act of bankruptcy committed: yet his selling the goods after notice, rendered him a trespesser ab initio. If it were not so, a sheriff would be in a better situation than any other wrong-doer. According to the case of Cooper v. Chitty, the distinction is between those cases where the sheriff acts innocently throughout, and where he acts wrongfully after notice.

But if the defendant be not a trespasser by relation, yet this evidence will at all events support the second count, which is a general count for taking the plaintiff's goods. It appears that the sale was after notice. Now every continuation of a trespass is considered as a new trespass. Dyer 320. Though the party is not obliged to bring several actions of trespess. where he might have brought one with a continuando, yet be may if he please. 2 Ro. Abr. 545. A. pl. 1. In trespass for taking goods, every day's taking is a new trespass. 279. Here, though the sheriff was not guilty of a trespass by relation, yet in the second count there is a different substantive charge for which there is no justification. P. 17. it is said that the purpose of laying two counts in a declaration is to avoid a new assignment, so that the defendant is under the necessity of pleading the general issue to one of The second count, therefore, in the present case, contains a substantive charge of trespass, and avoids the necessity of a new assignment.

Russel, in reply. As to the cases of executors bringing actions for goods taken in their testator's life-time, that is under the statute de bonis asportatis, which shews that at common

law it was otherwise.

This is not like the case of a person taking a waif, wreck, or estray, for there he takes without any colour of right, and Besides, those things is a wrong-doer in the first instance. being appurtenant to a manor, the owner thereof is considered as in possession.

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The sale after notice will not render the defendant in this case a trespasser by relation; because, though he had notice from the assignee, the commission might have been superseded. And the notice did not come from the party at whose suit the sheriff was in possession under the execution; but from a third person. And if the commission had been superseded, the sheriff would have been liable to an action by the party at whose suit the execution was taken out.

As to the unlawful possession of the sheriff; Lord Mansfield said, in Cooper v. Chitty, " to support the act of taking, "it is not lawful: but to excuse the mistake of the sheriff

"through unavoidable ignorance, it is lawful."

A sheriff ought to be better protected than any other wrongdoer; for he is compelled to do his duty, and does not act from his own choice.

The necessity for the new assignment is not waved by the second count, because the plaintiffs have not proved two tres-

passes.

He admitted that every continuation of a trespass was a new trespass; but that is assuming that the first taking was a trespass, which is denied in the present case. For if the sheriff had abandoned the possession immediately after the notice of the bankruptcy, he certainly would not have been liable to an action of trespass for the first taking.

ASHHURST, J. We will consider this question; but it seems to me that it is very like the case of Gooper and Chitty.

BULLER, J. The second count does not in all cases avoid the necessity of a new assignment. The general use of adding the second count is this; the first charges an injury done to the land, and taking the goods there: that is in its nature local, and must be proved where laid. Then the reason, and almost the only one, for adding the second count is, in order to avoid the locality; it is for taking goods generally. That is of a transitory kind, and may be supported, though the taking be proved to be elsewhere. There cannot be a new assignment but where there is a special plea. And if the case be such that, on a special plea, the plaintiff may be driven to a new assignment, he may give the matter in evidence under the second count on not guilty.

Cur. adv. vult.

Ashhurst,

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ASHHURST, J. now delivered the opinion of the Court:

It might perhaps have sufficed for us to say, that the point now in question has been solemnly determined in this Court in the case of Cooper against Chitty, upon full and mature deliberation, by a full court. And for that reason, whatsoever our opinions might have been (as we are now only two judges sitting in Court,) it would not have been very decent in us to have over-ruled the authority of that case. But we are reliesed from any difficulty on that account, as our opinion entirely coincides with that of the judges in the above case.

To entitle a man to bring trespass, he must at the time when the act was done, which constitutes the trespass, either have the actual possession (a) in him of the thing, which is the object of the trespass, or else he must have a constructive possession

in respect of the right being actually vested in him.

Such is the case cited at the bar of an action of treapass for an estray, or wreck, taken by a stranger before seizure by the lord. For the right is in the lord, and a constructive possession, in respect of the thing being within the manor of which he is lord.

So the executor has the right immediately on the death of the testator, and the right draws after it a constructive possession. The probate is a mere ceremony, but, when paged, the executor does not derive his title under the probate, but under the will: the probate is only evidence of his right, and is necessary to enable him to sue; but he may release, &c. before probate.

But there is no instance, that I know of, where a man who has a new right given him, which, from reasons of policy is so far made to relate back as to avoid all meane incumbrances, shall be taken to have such a possession as to bring traspose

for an act done before such right was given to him.

But at all eyents the rule will hold with respect to officers

and ministers of justice (b).

In the case of Lechmere v. Thoroughgood (c), which was an action of trespass brought by the assignees of bankrupts against a sheriff's officer, who took goods under an extent, the act of bankruptcy was on the 28th of April; afterwards the sheriff's officer took the goods under an extent, and then an assignment was made to the plaintiffs, who brought trespass; and it was held the action lay not; and the argument turned on this, that the officers shall not be made trespassers by relation. The same doctrine is recognized in the case of Baily and Bunning (d).

Now

<sup>(</sup>a) Vid, Ward v. Macauley. 4 vol. p. 489. (b) Vide 2 Ro. Abr. 561. tit. Troppes, G. 6. (c) 1 Show, 12. (d) 1 Lev. 173.

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Now here the execution was fully completed, and the goods sold, before the assignment to the plaintiffs. In the case of Cooper and Chitty, Ld. Mansfield lays down the true ground of distinction between the action of trover and the action of trespass, as applied to this case; "The action of trover (he. "says) is maintainable, because the conversion, and not the " taking, is the gist of the action; and the sale was after the " act of bankruptcy was notorious. But (he says) that though " the property by relation was in the assignees from the time " of the act of bankruptcy, yet the taking by the sheriff, as "applied to this species of action, was lawful. And he says " the seeming contrariety and confusion in the cases arises " from the equivocal use of the word lawful. For (says he) " to support the act, it is not lawful; but to excuse the mis-" take of the sheriff, it is lawful; or in other words the rela-"tion introduced by the statutes binds the property; but " men, who act innocently at the time, are not made criminal " by relation, and therefore are excusable from being punish-" able by indictment or action as trespassers. But as a ground "to support a wrongful conversion by a sale after a commis-" sion publicly taken out and an actual assignment made, it " was not lawful." The plaintiffs therefore are not injured. as it is competent to them to recover the value of the goods by bringing a proper action, namely, an action of trover. But the officer shall not be harassed by this species of action, in which the jury might give vindictive damages.

There is likewise another point made, namely, that the petitioning creditors (being more than three in number) have not proved a debt to such an amount as the statute requires; not having in the whole proved a debt to the amount of 2001.; though one of them has proved a debt to the amount of 1611. The words of the statute of 5 Geo. 2. c. 30. are, "that no "commission of bankrupt shall be awarded and issued out "against any person upon the petition of one or more credit-" ors, unless the single debt of the creditor do amount to 100%. " or upwards, or unless the debt of two creditors so petition-" ing as aforesaid shall amount to 150% or upwards; or unless "the debt of three or more creditors, so petitioning, shall "amount to 2001. or upwards." Now had the commission stood upon the perition of that one only whose debt amounted to 1611, it would clearly have been good: but as they have chosen to take it out in the name of more, the question is, whether they have not laid themselves under the necessity of complying with the words of the statute, which in such case requires.

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requires the debt proved to be 2001. This might perhaps deserve some consideration: but however we give no opinion upon it, as we are clear against the plaintiffs on the other point. Therefore on the whole the judgment must be for the defendant.

Postea to be delivered to the defendant.

Fiday, Nov. 24th.

The IRISH SOCIETY against NEEDHAM.

Under a bond of indemnity given by A. is answerable for all renewing the leases. not paid

EBT on bond for 3000l. The defendant craved over of the condition of the bond, which, [after reciting that the said society had by their letter of attorney dated the 16th that B. (who July 1755, appointed one Henry Hamilton their general or was appoint chief agent, or officer and receiver of all and singular their ed general a rents in the said letter of attorney, and the schedule or rental the receiver thereunder written, mentioned; and also that by certain artiof his rents, cles of agreement, of the same date with the letter of attorney, and the ma- made between the said society of the one part, and the said E. nager of his Hamilton of the other part, he the said H. Hamilton had coshould pay venanted and agreed with the said society to receive the said over to Call rents, and thereout to make the several payments, and to renrents which he should red der such account thereof from time to time, and to answer ceive, as also and pay the residue of such rents to the said society in such the increase manner as in and by the said articles is appointed, ] was, that and improve the said H. Hamilton, his heirs, executors, and administrators, of, upon any should from time to time, and at all times thereafter, well and new contracts truly pay, execute, and keep, all and every the covenants, aror renewale ticles, payments, &c. which on his and their part ought to be of leases; A. observed, performed, paid, &c. contained in the said deed of covenants, and also should from time to time observe, obey, fines receiv- perform, fulfil, and keep, all such further lawful, and reasons ed by B. on ble directions, orders, or instructions, as should be given him by the said society in writing under their hands, &c. He thest which were pleaded that the said deed of covenants was made on 16th ly 1755, between the said society of the one part, and the said over by him. Henry Hamilton of the other part, whereby, after reciting the the said society had appointed the said Hamilton to be their general or chief ugent, and also receiver of their rents, and atring their pleasure to manage and inspect, oversee, take care and regulate, the whole affairs, concerns, and interest, of the said society in the said kingdom of Ireland, and had promised and agreed to pay him 35Cl. per annum, so long as he should

against

be continued and employed by them, he the said Henry Hamilton covenanted that he should and would, for and during so long time as he should continue agent and receiver of the said The Intak rents, duly and truly, to the utmost of his power, collect and receive the same rents, and thereout pay yearly the several Narphan. sums therein mentioned; and further, that he the said Henry Hamilton should remit by a good and solvent bill, or by good and solvent bills of exchange, or otherwise, to the said society, or should answer, pay, and discharge to them, or their order or direction, in such manner as they should think fit, from time to time, by letter or otherwise, signified by their order by their clerk or secretary, or any other person of persons by them authorised, the whole rents mentioned and contained in the said schedule or rent roll, as also the increase and improvements that might or should thereafter be made thereof by or upon any new contracts or renewals of the then leaves, duly and punctually at the end of every six months next after such rents should become due. The defendant then pleaded the death of Henry Hamilton on the first day of June 1785, &c.; performance and satisfaction by the said Henry Hamilton in his life-time, and by the executors since that time, of all the covenants, payments, &c. contained in the said deed of covenant; and that the said Henry Humilton in his life-time, and his executors afterwards, had from time to time observed, obeyed, performed, fulfilled, and kept all such further lawful and reasonable directions, orders, or instructions, as were given to the said Henry Hamilton in his life-time by the said society in writing under their hands, according to the form and effect of the condition of the said writing obligatory.

Replication, (protesting that the said Henry Hamilton in his life-time did not well and truly pay, execute, and keep, nor had his executors, &c. since his death well and truly paid, executed, and kept, all or any of the covenants, payments, &c. in the said deed of covenants specified; protesting also, that the said Henry Hamilton did not in his life-time observe, &c. nor had his executors, &c. since his death observed, obeyed, performed, or kept such further lawful and reasonable direction, &c. given to the said Henry Hamilton in his life-time, by the said society in writing, under their hands, &c.) that after the making of the said writing obligatory, and in the lifetime of the said H. Hamilton, and before the exhibiting of the bill of the said society, to wit, on the first day of June 1783, a large sum of money, to wit, the sum of 18641. 17s. 11d. became due and payable to the said society, and was actually The IrusH SOCIETY againet

actually received by the said H. Hamilton for the rents, increase and improvements of the said estate, in the said condition and deed mentioned, yet that the said H. Hamilton in his lifetime did not pay, nor had his heirs, executors or administra-NAEDHAM tors since his death paid, to the said society the said som of 1864L 17s. 11d. or any part thereof, &c.

To this replication there was a general demurrer, and join-

der in demurrer.

Russel, in support of the demurrer, contended that this replication was bad in point of law; because it attempts to put in issue more than the covenant, on which the breach is assigned, comprehends: And no issue can be taken upon it under which the plaintiffs may not give in evidence the receipt and non payment of money by Hamilton, to which the covenant, for the performance of which the defendant is bound, goes not extend. For the replication is, that Hamilton had received for the rents, increase and improvements of the said estate: whereas the covenant is for the payment of particular rents specified in a schedule, and the increase and improvements thereof, that is, of those rents. Improvements of the estate is a more comprehensive term than improvements of rents, and extends to any thing that makes the estate more productive, whether by way of rent or otherwise. And the replication is framed in such a manner as to take in the case in dispute hetween the parties, namely fines paid for the renewal of leases, and received by Hamilton in his life-time. to which the covenant does not extend. And in the case of a surety the court will not extend a covenant beyond the strict letter. This is the question which is intended to be fairly tried by the parties.

But the replication is likewise bad on another ground. It is for non-payment generally, and it does not state that the cociety had made an order or direction for the payment of the money: whereas by the covenant Hamilton was to remit by a good bill, or pay to them or their order or direction, in such manner as they should think fit by letter or otherwise signified, the whole rents mentioned in the schedule or rens-soll. The replication therefore should have alleged that the society had made an order for the payment of a particular sum, and

that Hamilton had not paid it.

Baldwin, contra. It is admitted by the pleadings, that the sum of 1864L is due to the society for so much money received by Hamilton, and not paid over by him. And if only six-· Desidet pence of that sum be due for the rents, the plaintiffs are enti-

tled to judgment in this case.

But upon the general question, he contended that the word "improvements" included "improvements of the estate," and ought not to be confined to the "improvements of the rents." NEEDHAM. For Hamilton was appointed the general agent to the Society, in which character he was to receive fines as well as rents; and he was bound to pay over every thing which he received in the character of their agent. But even if in strictness the "improvements" only relate to "rents," "fines" must be considered as 'improvements of the rents."

Russel in reply. The issue which must have been taken on this replication would have been, that Hamilton had paid all the money "which he had received for the rents, im"provements, and encrease of the estate;" under which the plaintiffs could have given evidence of any thing received which made the estate more productive. The defendant therefore was obliged to demur to the replication, and to deny that, in point of law, the improvements could be extended to "improvements of the estate." As this is the case of a surety, the court will not extend the condition beyond the strict letter of it.

ASHHURST, J. It seems to me that the condition of the bond extends to all sums which Hamilton received as the general agent of the society. After reciting that he had been appointed the general or chief agent and receiver of the rents, it proceeds to state that he should remit by good and solvent bills the whole rents, as also the encrease and improvements that should be made thereof upon any new contracts or renewals of the leases. Now a fine is certainly an increase and improvement on a new contract. It was undoubtedly the object of this contract that Hamilton should pay over all sums of money which he should receive as general agent and receiver of this society. This was received by him as such on the renewal; and is both within the spirit and letter of the condition.

BULLER, J. The last objection made by the defendant's counsel is, that the replication has not alleged that the society made any order for remitting the sums which Hamilton had received: But it need not; for the covenant is, "that Hamilt" ton should remit to the said society by good and solvent bills "of exchange, or otherwise, or should answer, pay, and distributed think fit, by letter or otherwise signified," &c. If they had given any special direction, that should have been Vol. I. Rrr shewn

shewn on the part of the defendant. Then as to that part of this demand which was received for "fines;" the answer is,
The last that it does not so appear upon the record. There would Society have been no difficulty, if the defendant had joined issue on NERDHAM, the replication; for though the expressions are varied, they are the same in substance: and if it had been necessary, on issue joined, the court would have rejected the word " estate."

The next point is as to the quantum for which upon this contract the defendant as surety is answerable. The bond states that Hamilton was appointed the general agent and receiver of all the rents; he was not only to receive the rents. but to manage the whole affairs, concerns, and interest of the society. And I cannot put a construction on this bond of indemnity, without saying it extends to this very case; for it goes on to say, that Hamilton is to remit the rents, as also the encrease and improvements upon any new contracts or renewals: and a fine is an improvement on a renewal.

Therefore on all the grounds the defendant is liable. Judgment for the plaintiffs.

Friday, Nov. 24th.

## EDWARDS against ROURKE and WIFE.

A feme covert was discharged out of cus. tody, because she was arrest-. ed without though the writ was

> the husband,

\7 ON est inventus having been returned, to a writ sued out against both the defendants, as to the husband, the defendant's wife was arrested; and she afterwards obtained a rule to shew cause why she should not be discharged.

Mingay now shewed cause, and observed that, as the husband could not be found, this was the only remedy which the plaintiff had. And that the defendant's wife had little reason her husband; to make this application, since the suit had been instituted to recover a debt due from her before her marriage.

sued out Shepherd, in support of the rule, contended that the wife against both, could not be arrested without the husband. Cro. Jac. 445, on which Salk. 115. 6 Mod. 17. As to the case of Pearson v. Mary Meadon (a), the court refused to discharge the defendant on tus was returned as to common bail, because she had imposed on the plaintiff; and it was even doubtful whether she was a feme covert or not. But in the present case there is no doubt of the coverture of the defendant; and she is even sued as a feme covert.

Ashhurst,

(a) 2 Bl. Rep. 903.

ASHEURST, J. There are many authorities in favour of this application, and none against it. And the cases go with the reason of the thing.

EDWARDS

against

Rourke:

For a feme covert has no property of her own; and if it were permitted to arrest her, she might be imprisoned for life.

Per Guriam.

Rule absolute.

KING and Others, Executors of STEVENSON against Saturday,
THOM.
Nov. 25th.

The SAME against M'LINNAN.

INDORSEES of a bill of exchange, executors, &c. against Where a the acceptor.

The declaration stated that one Brand, on the 26th of De-change incember 1781, according to the usage and custom of merchants, dorses it to made a bill of exchange, directed to the defendant, requiring A. and B. him to pay to one A. Thom 1001.; that Brand delivered the they may said bill of exchange to A. Thom, which bill the defendant af-declare as tewards accepted according to the usage and custom of mer-such in an That A. Thom indorsed the said bill, by which in-action dorsement he ordered and appointed the said sum of money in acceptor. the said bill specified to be paid to the plaintiffs, who were the surviving executors of Stevenson, in right of the plaintiffs as surviving executors as aforesaid, and then and there delivered the said bill so indorsed to the plaintiffs, of which indorsement the defendant afterwards had notice; by means whereof, and according to the said usage and custom of merchants, the defendant became liable to pay to the plaintiffs as surviving executors, &c. and being so liable he undertook and promised the plaintiffs as surviving executors to pay them, &c.

2d Count. Money had and received by the defendant to the use of the plaintiffs as executors. 3d. On an account stat-

ed with the plaintiffs as executors.

To this declaration there was a special demurrer; that the said plaintiffs have above, in the first count of the said declaration, declared against the defendant upon a promise and undertaking alleged to have been made to the plaintiffs as surviving executors of the said R. Stevenson, whereas it appears that the promise by them, stated in the said first count of the said declaration, could not by law be made to them as such executors as aforesaid, but was made (if at all) to them in their

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THOM.

own right, and not as such executors; and that the said first count of the said declaration is inconsistent with, and cannot by law be joined together with, the said several other counts thereof, &c.

Gibbs, in support of the demurrer, admitted that the mere naming the plaintiffs as executors is surplusage, when the suit is in their own right (a). But here they have gone farther; they have stated the promise to have been made to them as executors; and there must be a sufficient consideration laid to support a promise to them in the capacity of executors; because it brings different consequences after it, and they are entitled

to greater privileges.

Ine consideration is the indorsement of a bill to them as executors, made after the death of their testator by the payee of the bill, who may have been a debtor of the testator. Then, as between the plaintiffs and the payee, who indorsed the bill to them, the payee was liable to them as executors for the debt due to the testator. They took this negotiable security from him: but a bill of exchange is not a satisfaction of a debt, unless it be duly paid. When payment was refused, they might have resorted to the defendant upon the original debt due to them as executors, and have declared accordingly. But if they choose to pursue their remedy on the bill, they must proceed in their own right, even against the person from whom they took it (though that is not the present case); for they desert, at least for the present, the original debt due to them as executors, and resort to the promise raised by the law to them in their own right as indorsees of a bill of exchange. But this is not a case between the plaintiffs and the person from whom they took the bill. Perhaps it might be said as between them, that the one knew in what capacity he received, and the other on what account he paid it; and so the promise might actually have been made as stated in the declaration. But this is an action against the acceptor, and the declaration states the consideration of the promise to the plaintiffs as executors, namely, his liability to pav the bill to them Now that liability averred in the declaration as executors. is a false conclusion of law; for by reason of the premises therein contained, and by force of the usage, &c. he is not liable to pay the bill to them as executors, but in their own right. The foundation of this action is the usage and custom of merchants, which has made such securities negotiable for

(a) 1 Ventr. 119.

King against

THOM.

the convenience of commerce, and gives to the bill-holder (being a legal indorsee) a right of action against the acceptor, drawer, or any of the indorsers. But that custom does not authorise a person either to take or pass a bill of this sort in a particular character, and confine his right of action in one case, and his liability in the other, to that character; except perhaps in the single case of an indorsee dying with the bill in his possession. But if an executor may take, he may pass, these securities, as executor; he may pay his own debts by indorsing bills as executor; and the effects of the testator may be ultimately taken in execution by those who were never either his creditors in his life-time, or creditors on his estate after his death. The usage of merchants will not support this declaration.

Shepherd, contra, was stopped by the court.

ASHHURST, J. There is no doubt but that this action may be supported. It must be taken for granted that the indorser was indebted to the testator, and to the plaintiffs, as executors, and so he might indorse to the plaintiffs, as such executors. Then they held the bill, as executors, and, upon the acceptor's refusing to pay it, they may declare upon the right in which they hold it. No case has been cited to shew that this cannot be supported: and the acceptor is not in a worse situation than he would have been, if the plaintiffs had declared against him in their own right. They have only declared according to the truth of the case.

BULLER, J. It is clear that a plaintiff cannot join two counts, one on a debt to himself, and another to him in the character of executor. Then, have the plaintiffs done it in this case? The only question is, whether the sum, when recovered, will be considered as assets of the testator? If so, that is all the court look to; and here it certainly would. There can be no such inconvenience, as has been suggested, from the executors indorsing the bill; for it is immaterial whether they indorse it as executors or not. If they indorse it at all, they are liable personally, and not as executors; for their indorsement would not give an action against the effects of the testator.

Judgment for the plaintiffs (a).

(a) Vide Bette, Executor, v. Mitchell, 10 Mod. 315.

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1786.

Saturday. Nov. 25th.

thement.

The KING against The Inhabitants of SKIPLAM.

WO justices by an order removed Elizabeth, the wife of William Ware from Page 1970 Hiring and P service from William Ware, from Beadlam to Skiplam, in the North the day after A william Ware, from Beadiam to Skipiam, in the North Old Martin. Riding of Yorkshire. On appeal the Sessions confirmed that mas-day un- order, and stated the following case:

That it appeared that William Ware, the husband of the Mertinmasdes following pauper at Old Martinmas 1777, being then unmarried, is sufficient hired himself for a year to one J. Richardson of Skiplam, and to give a set- actually served the said J. Lichardson for a year at Skiplam, That the said William Ware on the pursuant to such hiring. next day after Old Martinmas-day, to wit, on the 23d of November 1778, being then also unmarried, hired himself to one Richard Barker of Nawton, to serve him from thenceforth until the Old Martinmas-day following; and that he did accordingly enter into the service of the said R. Barker a few days after such hiring, and continued to serve him in Nawton aforesaid, pursuant thereunto, until the Old Martinmas-day following, on which day about twelve o'clock at noon he received his full wages, and left his master's house in the evening of the same day.

> Fearnley shewed cause against a rule which had been obtained to shew cause why the order of Sessions should not be

quashed.

Chambre, in support of it, cited R. v. Navestock, Burr. S. C. 719. Bott. 386. and R. v. Syderstone cum Bermer, Cald. 19.

Ashhurst, J. It is much to be lamented that there is so much confusion in settlement cases; therefore whatever the latest determinations may be, they ought to be adhered to. Now the last case, namely, that of the King and Syderstone, seems to correspond with the present in every point. Before that, a distinction had been made, as where the hiring and service had been expressly found to be for a year according to the custom of the country. But in the last case no such distinction was taken; so here there is no custom stated; and " until" must be taken to be inclusive. Therefore there was a hiring and service for a year; for the pauper's husband entered into the service the first day of one year, and served till the first instant of the next.

Buller, J. The only question is, whether Martinmas-day is to be taken inclusive or exclusive. The pauper's husband WII

was hired the day after Martinmas-day, to serve till the Martinmas-day following. From the moment of the hiring he became the servant of his master, and continued in the service The KING till Michaelmas-day. Then does the word till include the day? The former cases have decided that it does. And if it only include a part of the day, as there is no fraction of a day, the service would be complete.

agninet

Rule absolute for quashing both the Orders.

DOE, on the Demise of SELBY, against ALSTON, Bart. Nov. 27th.

THE lessor of the plaintiff had brought an ejectment in Rule for the the Court of Exchequer in the year 1784 to recover the lessor of the possession of the same premises, for which the present action give security was brought, but had abandoned his suit when it came on to for costs, in be tried.

an ejectment

A rule had been obtained calling on the lessor of the plain-depending, tiff to shew cause why the proceedings in this action should not be staid till he gave security for the costs, in case he was non-suited, or a verdict was given against him. This rule was founded on an affidavit, which stated that, in the former ejectment, the Court of Exchequer had obliged the lessor of the plaintiff to give security for the costs of that action.

Erskine now shewed cause, and relied on there being no instance in which a similar rule had been made. And stated that the reason why the Court of Exchequer had compelled the lessor of the plaintiff to give security was, because it was

stated to them that he could not be found.

Baldwin in support of the rule.

Buller, J. This application is not warranted by any authority. The case in the Court of Exchequer does not apply There are only three instances in which the Court will interfere on behalf of a defendant, to oblige the plaintiff to give security for costs. The first is, when an infant sues, the Court will oblige the prochein amy, or guardian, or attorney, to give security for the costs; 2dly, when the plaintiff resides abroad (a), in which case the Court will stay the proceedings

(a) Ante 267, 362.

DOE against ALSTON. till security is given for the cost: and 3dly, where there has been a former ejectment (a); but there the rule is to stay the proceedings in the second ejectment, till the costs of the former are paid, and not till security is given for the costs of the second. So that even the form of the present application is But it is not stated that the costs of the ejectment in the Court of Exchequer have not been paid.

Rule discharged.

(a) This rule is extended to other actions than ejectment. Vide 2 vol. 511. Weston v. Withers.

Tuesday, Nov. 28th.

## KING against PIPPETT.

in case of a ed on the plaintiff's neglecting to carry the to trial, where the defendant might have carried it down by proviso.

Judgment as T TPON a rule to shew cause why judgment should not be entered as in case of a nonsuit, it appeared that the issue non-suit can-not be enter-had been joined in *Hilary* term last, and the plaintiff had carried down the record to trial at the Lent assizes for Deven, where the plaintiff was nonsuited, which nonsuit was afterwards set aside by the Court on a point of law (a). record down ground of this motion was, that the plaintiff had neglected to proceed to trial at the Summer Assizes, which it was now contended he was not obliged to do, having complied with the statute (b) by having carried the record down to trial once; and that the defendant might, if he had pleased, have carried it down by proviso (c).

The Court were of that opinion, and

Discharged the Rule (d).

Gibbs in support of the rule. Lawrence, contra.

\*..\* ALT HOUGH

(a) Ante 235. (b) 14 Geo. 2. c. 17. (s) Vid. Blewburn v. Langley, post 3 vol. 1 S. P. and Porzelius v. Maddocke, 1 H. Bl. Rep C B. 101 S P. (d) No judgment as in case of a nonsuit in replevin. Jones v. Concesses, part. 3 vol. 661. and Egyleton v. Smart. 1 Bl. Rep. 375. Bu judgment as in case of a nonsult may be given in a traverse of a return to a mandamus. R. v. The Mayor. Cr. of Stufferd, post. 4 vol. 689.

\*\*ALTHOUGH the following case does not come within the scope of our original design, which was only that of reporting the determinutions of the court of King's Bench, yet as it is of great importance and considerable expectation, and as we have been honoured with an authentic copy of the reasons for reversing the judgment of the court of Exchequer, and succeptable with most of the other original papers relating to the cause, we trust it will not be unacceptable.

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## SUTTON against JOHNSTONE.

London, Evely' Sutton Esquire; a debtor of our Lord Hilary (to wit.) exchequer on the twenty-third day of January, in this same 24th Geo. & term, by Joshua Peart, his attorney, and complains by bill against George Joshnstone esquire, present here in court the same day, of a plea of trespass upon the case; FOR THAT WHEREAS, on the 16th of April 1786, and long before, and afterwards, there were open war and hostilities between our Sovereign Lord George the Third, now king of Great Britain, &c. and the French King, his most Catholic Majesty, and the States General of the United Provinces; and whereas, during such war and hostilities, and before the committing of the several grievances herein-after-mentioned, (that is to say) on the said 16th of April 1781, a squadron of ships and vessels of war, of and belonging to our said Sovereign Lord the King, had been sent out and employed under the command of the said George, as commander in chief of the said squadron, upon a particular service, and expedition, against his said majesty's enemies; and the said squadron, under the command of the said George, had proceeded in the course of such service and expedition to Port Praya Bay, otherwise Port Praya Road, in the island of Saint Jago, in foreign parts: and also whereas the said Evelyn before and on the said 16th April 1781 was captain and commander of one of his said Majesty's ships of war, called the Isis, being one of the said squadron, and, as such, under the command of the said George, as commander in chief of the said squadron, and which said ship, called the Isis, was also in the said squadron in the said service and expedition, of the said Port Praya Bay, otherwise Port Praya Road, in the said island of St. Jago: and whereas, before the committing of the said several grievances herein after-mentioned, and whilst the said squadron under Vol I. Sss

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the command of the said George, as commander in chief thereof, was in the said Port Praya Bay, otherwise Port Praya Road, to wit, on the said 16th April 1781, the said squadron was attacked in an hostile manner by a squadron of ships and vessels of war of great force, belonging to the French King, under the command of Monsieur Suffrein, as commander in chief of the said French squadron, in consequence of which an action or engagement then and there took place between his said Majesty's squadron, under the command of the sai. George, as commander in chief of the same squadron, and the said squadron belonging to the French King, under the command of the said Monsieur Suffrein; and in which action or engagement the said ship called the Isis was greatly damaged: And whereas also the said squadron belonging to the French King, under the command of the said Monsieur Suffrein, after such action or engagement on the same 16th of April 1781, sailed away from and left his said majesty's squadron, under the command of the said George, in the said bay or road; and the commanders of the said ships and vessels of his said Majesty's squadron were thereupon ordered by the said George, as commander in chief of the said squadron, to cut or slip their cables, and put to sea after the said squadron belonging to the French King, under the command of the said Monsieur Suffrein; and whereas the said squadron under the command of the said George, did afterwards on the same day and year last aforesaid put to sea after the said squadron belonging to the French King; and the said George as such commander in chief as aforesaid then and there, by signal for that purpose, caused the said squadron under his command to be formed in line of battle, and bore down with his said squadron under his command upon the said enemy about sun-set of the same 16th April 1781, in order to engage the said enemy, but no further engagement between the said squadrons took place; and the said squadron, under the command of the said George, returned to Port Praya Bay, otherwise Port Praya Road aforesaid. And although he the said Evelyn, during the whole of the said engagement with the said French squadron, and the said pursuit, and bearing down upon the said French squadron, as aforesaid, and during the whole of the said 16th April 1781, behaved and conducted himself as a gallant, good, loyal, obedient, and faithful captain and commander of the said ship of war called the Isis, and did his duty, as such, to the best of his power, skill and ability, and the state and condition of the said ship the Isis, and was never guilty of delaying

ing and discouraging the public service on the 16th April 1781, or at any other time, nor of wilfully or willingly disobeying the verbal orders or public signals of the said George in any respect, nor of wilfully and improperly falling a-stern, Johnstone and not keeping up in the line of battle, according to the signal then abroad, after the Isis had joined the squadron, and cleared the wreck of the fore-top-mast, when he the said George bore down upon the enemy about sun-set of the said 16th April 1781, nor of any other neglect, disobedience, misconduct, or misbehaviour, as captain of the said ship called the Isis; yet the said George, well knowing the premises, but maliciously, injuriously, and wrongfully, contriving and intending, to hurt the said Evelyn in his good name, fame, character and reputation, as a captain and commander of a ship of war in his majesty's service, and to cause him to be suspected of cowardice, treachery, disloyalty, disobedience of orders, neglect, and misconduct, and to bring him into great disgrace, infamy and contempt, with all his Majesty's subjects, and to deprive him of his rank and station of captain and commander of the said ship called the Isis, and of the profits, advantages, and emoluments, thereto belonging; and to subject him, the said Evelyn, to the pains and penalties by the laws and statutes of this realm inflicted upon captains and commanders of ships of war guilty of cowardice, disobedience of orders, neglect, misconduct, and other the crimes aforesaid, and to put him the said Evelyn to great labour and trouble of body and mind, and to great charges and expences of his money, and to impoverish and ruin him the said Evelyn; he, the said George, so being such commander in chief as aforesaid, afterwards, to wit, on the 22d April 1781 aforesaid, at Port Praya Bay, otherwise Port Praya Road aforesaid, to wit, at London aforesaid, in the parish of Saint Mary le Bow, in the ward of Chenp, falsely and maliciously, and without any reasonable or probable cause, charged and accused the said Evelun with having, on the said 16th April 1781, on the occasions and service aforesaid, committed the crimes and offences hereafter next mentioned, (that is to say ) disobedience of his the said George's verbal orders, and public signals, in not cutting his, the said Evelyn's cables, (meaning the cables of the said ship the Isis,) and putting to sea after the enemy, (meaning the said French squadron,) as he, the said George, had directed; and for falling a-stern after he the said Evelyn had joined the squadron, (meaning the said squadron under the command of the said George as aforesaid;) and not keeping up in the line of battle, after he, the said Evelyn, had cleared the wreck

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wreck of the fore-top-mast, when he, the said George, made the signal for the line of battle a-breast, and bore down on the enemy (meaning the said French squadron) at sun-set; by which disobedience and neglect, as the said George charaed and alleged, the enemy (meaning the said French squade ron) were enabled to take their disabled ships in tow, to lead the squadron under the command of the said George for to leeward of the island, (meaning the island of Suint Jage,) to draw matters on in such a train, that it became impossible to engage them (meaning the said French squadron) with the whole force of the said squadron under the command, of the said George before the close of day, and in case of following the enemy (meaning the said French squadron) until the morning, or attacking them in the night, the said George must have given up all hopes of ever rejoining the transports and East India ships under the said George's convoy, wherehe an opportunity was lost of improving the victory, the said squadron, under the command of the said George, had obtained; and the said George, as such commander in chief aforesaid, afterwards, to wit, on the said 22d April, in the year aforesaid, at Port Praya Bay, otherwise Part Praya Road, to wit, at London aforesaid, in the parish and ward aforesaid, out of his further malice to the said Evelun did. under colour and pretence of the said supposed crimes and offences, falsely, maliciously, wrongfully, and injuriously. and without any reasonable or probable cause, put, and cause to be put, him, the said Evelvn, under an arrest and imprisonment in order that he, the said Evelyn, might be tried by a court martial for the same supposed crimes and offences; and did also wrong fully, muliciously, and injuriously, and without any reasonable or probable cause, under colour and pretence of the said supposed crimes and offences, suspend and remove him. the said Evelyn, from his said office, post and rank, of captain and commander of the said ship the Isis, until a court-martial should be held for the trial of the said Evelyn, for the same supposed crimes and offences; and maliciously, and without any reasonable or probable cause, sent, and caused to be sent him, the said Evelyn, so being under the said arrest, imprisonment, and suspension, unto the East Indies, and from theuse to Great Britain, in order to be tried by a court-martial, for the said supposed crimes and offences; and maliciously, and without any reasonable or probable cause, kept, and caused him the said Evelyn to be kept, under such arrest, imprisonment, and suspension, for a long space of time, to wit, from the said 234 April 1781 until the 11th December 1783, and until the

time of the trial and acquitted hereafter next mentioned; and 1786. the said George, out of his further malice towards him, the said Evelun, and contriving and intending as aforesaid, after- Surton wards, to wit, on the 1st December 1783, at London aforesaid, against in the parish and ward aforesaid, falsely, maliciously, and without any reasonable or probable cause, caused, and procured the said Euclin to be tried by and before a court-martial, for that purpose duly assembled, on board his majesty's ship Princess Royal, before John Montague, Esquire, admiral of the blue squadron of his majesty's fleet, &c. and others, for the said supposed crimes and offences, and upon a false, mabeious, and injurious charge, exhibited against the said Evehon, as late commander of his majesty's ship Isis, by the said George, as late commander in chief of his said majesty's ships and vessels employed on the said service, for delaying and discouraging the public service, on which he the said Evelyn was ordered on the said 16th April. 1781, and for disobeying his the said George's verbal orders, and public signals, in not causing the cable of his Mujesty's ship Isis, then under his the said Evelyn's command, to be cut or slipped immediately after his, the said Evelyn's, getting on board in order to put to sea after the enemy, (meaning the said French squadron,) as he, the said George, had directed, and also for fulling a-stern, and not keeping up the line of battle according to the signal then abroad, after the Isis had joined the squadron, (meaning the said squadron under the command of the said George,) and cleared the wreck of the fore-top-mast, when he, the said George, bore down upon the enemy, (meaning the said French squadron,) about sun-set of the said 10th April; at which said trial, the said court-martial, having heard the witnesses produced in support of the said charge, and by the said Evelun in his defence, and having heard what the said Evelyn had to urge in his defence, and having maturely and deliberately weighed and considered the whole, was of opinion that it appeared to them, that the said Evelyn did not delay or discourage the public service, on which he was ordered, on the said 16th April 1781; That, from the circumstances proved of the condition the Isis was in, it appeared to the said court-martial, that the said Evelyn was justifiable in not immediately cutting or slipping the cable of the Isis, after his get. ting on board her on that day; and that, after the wreck of the fore-top-mast had been cleared, the said Evelyn did his utmost to regain his station in the line of battle; and that the Isis was in her station about sun-set of that day; the court did therefore

SULTON against

therefore adjudge the said Evelyn to be honourably acquitted of the whole of the said charge, and he was thereby honourably acquitted accordingly; by means of which said false, malicious, and wrongful proceedings of the said George, he the said Evelun not onl. suffered and endured a long and grievous inprisonment for a long space of time, (to wit,) for the space of 2 years, 7 calendar months, and 19 days, but during that time lost and was deprived of divers sums of money, amounting in the whole to a large sum, (to wit,) 20,000%. of lawful money of Great Britain, which he would otherwise have gained, if the had not been suspended and removed by the said George from his rank and post of captain and commander of the said ship called the Isis, from prizes and captures, which were taken and made from the enemy by the said ship the Isis, and the other ships of the said squadron, under the command of the said George, in the course of the said service and expedition, and during the said arrest and suspension of him the said Evelua. for the time aforesaid; and also suffered, sustained and underwent, great hardships, from grief, vexation, and anxiety of body and mind, and was thereby put to great and heavy charges and expences of his money, amounting in the whole to a large sum of money, (to wit,) the sum of 5000l. of like lawful money, in and about the defending himself against the said fulse and malicious charge and accusation of the said George, and the manifestation of his innocence in the premises; and was also thereby greatly aggrieved, hurt, and damnified, in his good name, fame, character, and reputation, to wit, at London aforesaid, in the parish and ward aforesaid.

2d Count.

The second count was similar to the first, except in this particular, that it omitted to allege, as part of the defendant's accusation, the consequence of the disobedience of the orders, namely, that the enemy were enabled to take their disabled ships in tow, &c. and that an opportunity was lost of improving the victory which the commodore had gained.

3d Count.

The third count, after reciting the war, the expedition to Port Praya, the relative situation of the parties, the engagement, the order given to all captains to cut or slip their cables, and pursue the enemy, the putting to sea after the enemy, the signal for the line of battle, the bearing down upon the enemy, the returning of the squadron to Port Praya Bay, proceeded as follows: And whereas the said George, as such commander in chief, as aforesaid, after the said 16th of April 1781, and whilst the said squadron remained under the command of the said George in foreign arts, as aforesaid (to wit,)

wit,) at the said Port Praya Bay, otherwise Port Praya Road, in the island of Saint Jago, as aforesaid, (to wit) on the 22d of April 1781, charged and accused the said Evelyn of being guilty of other misconduct and neglect on the said 16th of JOHNSTONE April 1781, on the occasions and service aforesaid, (that is to say,) for disobedience of the verbal orders of the said George, and of the public signals of the said George, in not cutting his cables, (meaning the cables of the said ship Isis,) and putting to sea after the enemy, (meaning the said French squadron.) as he the said George had directed, and for falling a-stern after the said Evelyn had joined the squadron, and not keeping up in the line of battle after he the said Evelyn had cleared the wreck of the fore-top-mast, when he the said George made the signal for the line of battle a-breast, and bore down on the enemy, (meaning the said French squadron) at sun-set; by which disobedience and neglect, as the said George charged and alleged, the enemy, (meaning the said French squadron) were enabled to take their disabled ship in tow, to lead the squadron under the command of the said George far to leeward of the island, (meaning the island of Saint Jago.) to draw matters on in such a train, that it became impossible to engage them, (meaning the said French squadron,) with the whole force of the said squadron under the command of the said George before the close of day, and in case of following the enemy, (meaning the said French squadron,) until the morning, or attacking them in the night, the said George must have given up all hopes of ever rejoining the transports and East India ships under the said George's convoy, whereby an opportunity was lost of improving the victory the said squadron under the command of the said George had obtained; and upon the said charge did then and there put, and cause to be put, the said Evelyn under an arrest and imprisonment, in order to be tried by a court martial for the said last-mentioned supposed misconduct and neglect; and upon the said charge did also then and there suspend and remove the said Evelyn from his place, rank and station of captain and commander of the said ship the Isis, until such court-martial could be held for the trial of the said Evelyn: And, although it was the duty of the said George, as such commander in chief as aforesaid, to have holden, or caused to have been holden, a court-martial for the trial of the said Evelyn, for the said supposed neglect and misconduct of the said Evelyn, when and so soon as he reasonably and conveniently could after the said charge, arrest, and suspension. And although the said George, as such commander in chief, might reasonably

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and conveniently, after the said charge, arrest, and exeptinion, have holden, and cause to have been holden, a court-martial for the trial of the said Evelyn, for the said supposed neglect and misconduct, during the stay of the said equation under the command of the said George at Port Praya Buy, stherwise Port Praya Road, as aforesaid, as well as often after the departure of the same squadron from Port Praya Bay, etherwise Port Praya Road, aforesaid, whilst the same remained under the command of the said George, in foreign parts as aforestid, there being, during all such time, a competent number of officers, of and in the said squadron under the command of the sail George, to compose such court-martial: And although the said George was, during that time, frequently requested by the said Evelyn, to hold, and cause to be holden, such court-martial for the trial of the said Evelyn as aforesaid, to wit, at London aforesaid, in the parish and ward aforesaid: Yet the said George, well knowing the premises, but contriving, and wrongfully, injuriously, and maliciously, intending to hard, aggrieve, vex, oppress, injure, and damnify, the said Boches. and to cause him to be kept under such arrest and imprisonment, and to be suspended and removed from his said rank. station, post, and office of captain and commander of the said. ship the Isis, for a long and unreasonable space of time; and during such time to deprive the said Evelyn of the benefits, profits, and advantages appertaining to such rank, station, post, and office, and to injure him in his good name, fame, elisracter, and reputation, and to bring him into great contempt and infamy among all the officers and men of his said Majesty's squadron, under the command of the said George as after. said; he the said George wilfully, wrongfully, and injuriously, and contrary to the duty of the said George as such commander in chief as aforesaid, omitted, neglected, and refused to hold, or cause to be holden, a court-martial for the **trist of** the said Evelyn as aforesaid, during the stay of the said squareron under the command of the said George at Port Praya Bay. otherwise Port Praya Road, as aforesaid, or at any time after the departure of the same squadron from Port Prava Bev. otherwise Port Praya Road, as aforesaid, whilst the same remained under the command of the said George in foreign parts as aforesaid; and thereby wilfully, wrongfully, and injuriously, kept and detained him the said Evelyn so under the said atrest, imprisonment, and suspension, for a long and unreasonable space of time, and until the trial and acquittal herealth mentioned; and the said Evelyn says, that he the said Escher afterwards.

afterwards, (to wit,) on the 1st of December 1783, to wit, at London aforesaid, in the parish and ward aforesaid, was tried by a court-martial, duly assembled and held in that behalf, for the said supposed neglect and misconduct, and was by the Johnstons said court-martial then and there honourably acquitted thereof; by means of which said wilful, wrongful and injurious neglect, omission and refusal of the said George, to hold, or cause to be holden, a court martial for the trial of the said Evelyn as aforesaid, in a reasonable and convenient time as aforesaid, he the said Evelyn not only suffered and endured a long and unreasonable imprisonment, but during that time lost and was deprived of divers sums of money, amounting in the whole to a large sum, (to wit,) 20,000l. which he would have gained if he had been tried as aforesaid in a reasonable and convenient time after the said arrest and suspension, from prizes and captures which were taken and made from the enemy by the said ship the Isis, and other ships of the said squadron, under the command of the said George, in the course of the said service and expedition, and also suffered, sustained, and underwent great hardships, pain, grief, vexation and anxiety of body and mind, and was thereby put to great and heavy charges and expences of his money, and was greatly aggrieved, hurt, and damnified, in his good name, fame, character, and Apputation, to wit, at London aforesaid, in the parish and ward aforesaid.

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The fourth count differed from the third in the same man-4th count. ner that the second differed from the first.

To this the defendant pleaded the general issue.

This cause was twice tried before the chief Baron at Guildhall, by special juries; on the former of which the jury found a verdict for the plaintiff, with 5000% damages, and on the latter they gave 6000l.

Afterwards a motion was made in the court of Exchequer, in arrest of judgment, which after a very elaborate discussion was refused. And, in the absence of the Chief Baron, who

was indisposed,

Eyre, Baron, delivered the unanimous opinion of the court : June 15th In this case of Sutton against Johnstone, it has been mov-1785. ed to arrest the judgment, upon objections taken to the first

and third counts in the declaration.

It is an action on the case brought by the plaintiff, captain of the Isis ship of war, one of the squadron under the command of the defendant: And the first count imputes to the defendant the having maliciously, and without probable cause, charged the plaintiff with the crimes of disobedience of orders, Vol. L Ttt

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and the delay of the public service in which the squadron was engaged; and upon that charge, having put him under arrest, suspended him from his command, sent him under arrest to the East Indies, and from thence to Great Britain, in order to be tried; and having maliciously, and without probable cause, kept him under arrest till his trial; and having maliciously, and without probable cause, procured him to be tried by a court-martial, upon a false, malicious, and injurious charge.

This being the ground of the action, expressed in the first count of the declaration, it is objected, in arrest of judgment, that no action for a malicious prosecution will lie for a subordinate officer against the commander of a squadron for improper conduct while under his command; or, as put by one of the counsel, no action lies for a subordinate officer against his superior officer, for an act done in the course of discipline,

and under powers incident to his situation.

These propositions have been supported by arguments drawn from the analogy the case is supposed to bear to the case of judges, jurors, and the attorney-general in respect of his power to file informations ex officio, and from general principles of public policy and convenience; and they have been rested upon those grounds, there being no adjudged case or other authority in our law, that can be made to bear upon the point, so as to give it any support: On the contrary, it was necessary to press into the service distinctions and refinements, in order to take the case out of the class of adjudged cases bearing very strongly the other way. The cases I allude to are those of Wall and M. Namara (a) and Fabrigas and Mostyn (b); which being cases in which one species of action is supported against military men in command, in one instance by a subordinate officer, in the other by a person subject to the powers incident to the situation of those military men in command, for acts done by colour of their authority, or in the language of one of the propositions, under the powers incident to their situation, it does not readily occur, why another species of action, differing from those in form rather than in substance, should not also be sustained. These cases certainly cut up all argument drawn from public policy and convenience; because public policy and convenience, if they operate at all, must operate with strength sufficient to bar one species of action as much as another.

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<sup>(</sup>a) Sittings after Michaelmas 1783, at Westminster, cor. Lord Mansfield. Vide post. 536.

(b) Comp. 161.

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The court never had a difficulty upon this part of the case. The principle of the action, which is pretty clearly ascertained in the two cases of Saville v. Roberts (a), and Jones v. Gwynn (b), is general and universal. In the cases alluded to of judges against and jurors, it cannot apply, because the law gives faith and credence to what they do; and therefore there must always. in what they do, be cause for it; and there never can be any malice in what they do. The presumption of law, that judges and jurors do nothing causelessly and maliciously, does not derogate from the universality of the principle, "that where it can be shewn that one man has causelessly and maliciously accused another of a crime, or has otherwise vexed him by causelessly and maliciously exercising upon him, to his damage, powers incident to his situation of superior, the injured party is entitled to redress by this species of action." The commander in chief of a squadron of ships of war, is in the condition of every other subject of this country, who, being put in authority, has responsibility annexed to his situation.

The propositions, which attempt to establish a distinction for him, are dangerously loose and indefinite. It is said, subordinate officers may be brought to a court-martial for improper conduct, and that no action lies for any thing done in a course of discipline, or under powers incident to situation. If, by improper conduct, be meant a breach of the articles for the government of the navy; if, by a course of discipline, be meant exacting that which the discipline of the navy requires; if, by what is done under powers, be meant that which is warranted to be done under those powers; it will be agreed simply, for doing any of those acts no action will lie; for those are lawful acts in themselves, and there is nothing added to make them unlawful in the particular case. But in respect of the first branch of this proposition, if it be meant that a commander in chief has a privilege to bring a subordinate officer to a courtmartial for an offence which he knows him to be innocent of, under colour of his power, or of the duty of his situation to bring forward enquiries into the conduct of his officers, the proposition is too monstrous to be debated.

Under the second branch of it, it may not be fit, in point of discipline, that a subordinate officer should dispute the commands of his superior, if he were ordered to go to the masthead: but if the superior were to order him thither, knowing that, from some bodily infirmity, it was impossible he should

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execute the order, and that he must infallibly break his neck in the attempt, and it were so to happen, the discipline of the navy would not protect that superior from being guilty of the crime of murder. And one may observe in general, in respect of what is done under powers incident to situations, that there is a wide difference between indulging to situation a latitude touching the extent of power, and touching the abuse of it. Cases may be put of situations so critical that the power ought to be unbounded: but it is impossible to state a case where it is necessary that it should be abused; and it is the felicity of those who live under a free constitution of government, that it is equally impossible to state a case where it can be abused with impunity. The counsel for the defendant were disposed to agree to this general doctrine, provided that the question was not to be discussed in an action at law. which unavoidably brings the enquiry into a matter of fact before a jury. We enter into all the difficulties in the situation of an officer, whose honour and fortune may come to be so staked. In this particular case they have had their weight with us; the decision has not been a hasty one; but considerations of this nature cannot exclude the established jurisdiction of the country: on the contrary those jurisdictions must be presumed to be equal to their functions; it must be presumed that they will do their duty honestly; if they do, no man can have much to fear. To situations which require indulgence, they will shew it; but, be the risk more or less, all men hold their situations in this country upon the terms of submitting to have their conduct examined and measured by that standard which the law has established. Men of honour will do their duty and will abide the consequences.

We decide against this first objection, upon the mere abstract state of it, without referring to the particular case made upon this record; which is certainly the most advantageous way of considering it for the defendant; for undoubtedly upon this record, which must now be taken to be proved, there is a strong case stated of hardship, if not of wrong, injustice, and violence. Before I leave this head of objection, I will observe upon an order of the justices of gaol delivery, which is printed at the end of Kelynge's Reports, from whence it was inferred that the court have thought themselves at liberty to control this species of action; but the nature of that control, which was the withholding of the evidence, rather proves that the action itself was thought to be beyond the reach of any control; in truth, it seems to be nothing more than substituting a particular license to give copies upon mo-

tion, to the general license which the officer of the court had been permitted to issue; both founded upon the absolute power of the court over the records of their proceedings for felony, while they remained in their custody. The object of against this order, and of many of the expressions we meet with in our books, tending to discourage this species of action, could not be to protect any particular class of cases from being made the subject of the action; but were to prevent a frivolous and vexatious action of this species being brought in any case.

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The next objection taken to this count was, that this being an action founded on the want of probable cause for making the charge, the action fails; because upon the face of the record, and upon the plaintiff's own shewing, there was probable cause. It is upon the face of the sentence of the courtmartial that the probable cause is said to appear: part of the charge being for disobedience of orders, in not slipping the cable of the Isis, immediately after the plaintiff got on board: the language of the sentence is, that from the circumstances proved of the condition the Isis was in, it appeared to the court-martial that the plaintiff was justifiable in not immediately cutting or slipping the cable after his getting on board; from whence it was collected, that it appears that the plaintiff did disobey the orders of the defendant, and that he was driven to justify himself by circumstances, and that his acquittal proceeded, not upon the ground of his not having disobeyed, but on the ground of his justification.

Upon this part of the case there has been some hesitation amongst us. A case not cited in the argument at the bar, as I recollect, but which occurred to us in the searches that have been made, gave considerable countenance to the objection. The case I refer to is that of Reynolds v. Kennedy reported in Wilson (a). It was a case in error from the King's Bench in Ireland: an action was brought for maliciously, and without probable cause, prosecuting for condemnation brandy seized as forfeited; the declaration stated that the brandy was condemned by the sub-commissioners, and that the condemnation was most rightfully reversed, on appeal to the commissioners, The judgment was arrested in the court of King's Bench in Ireland, and that judgment affirmed here; and it was said by Lord Chief Justice Lee, "the plaintiff has, by his own declarase tion, shewn that the prosecution was not malicious, because se the sub-commissioners gave judgment for the defendant, and

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"therefore we cannot infer any malice in him." Perhaps it would have been more correctly stated, if they had said, and therefore we will infer that there was probable cause for prosecuting that brandy to condemnation. To my apprehension, I confess, the fact of the orders having been disobeyed seems fairly to be collected from the sentence, which takes upon itself to iustify the not obeying, and to make that the ground of the acquittal. If the state and condition of a ship be such that an order given cannot be obeyed, the not obeying in that case is not disobedience, and requires no justification; but there ought to be an acquittal upon the ground of the charge of disobedience not being made out. But if a subordinate officer, having received an order which might be obeyed, does not obey, because, regard being had to the state and condition of his ship. he is of opinion that such an order ought not to have been issued to him, in this case the not obeying is disobedience, in my apprehension, and he would be to justify himself as he could.

The sentence not being examinable here, I am relieved from the difficulty of comprehending what circumstances can amount to a justification of a subordinate officer, in disobeying the order of his superior. We are bound by the sentence to understand the plaintiff in this case to stand jus-But the question is, whether we are not also bound to conclude, from this sentence, that he did in fact disober? and whether that be not probable cause for bringing him to a eourt-martial, there to justify himself for that disobedience? Doubtless a court-martial is not bound to express itself in strict technical language, and this court martial may have used in this case the word justifiable in some sense different from our notion of justification: but having acquitted the plaintiff generally of the charge of delaying the public service, which was one of the two specific charges brought against him, and having made this special acquittal upon the charge of disobedience of orders, it does seem as if they meant to say that he did not delay the public service, but that he did disobey the order, and, for some reason satisfactory to them, was justified in that disobedience. If this be the true meaning of the sentence, will not the fact of disobedience thus established be a probable cause for bringing him to a court-martial? If the defendant is, upon this declaration, to be taken to be ignorant, or if he is not averred to be cognizant, of all the circumstances which constituted the justification, I should in that case hold most clearly that it would be probable cause.

cause. Reasonable suspicion was probable cause in the ancient proceedings in conspiracy: There is more than suspicion here, the corpus delicti in this case stands confessed. It is averred against the defendant in this declaration that he knew the ship had received damage, that he knew that the plaintiff JOH MATONES obeyed his orders as far as the state and condition of his ship would permit; but it is not averred that he knew the circumstances of the state and condition of the ship, which were proved to the court-martial, upon which the justification is built. This undoubtedly is rather critical: but what if the defendant were taken to be cognizant of all the circumstances of the state and condition of the ship proved to the courtmartial; did he know or was he bound to know that they would amount to a justification in the judgment of the courtmartial? In our law, justification is a conclusion of law, which necessarily results from a given state of facts; and yet I doubt, whether if a man were to indict one for murder, who had committed homicide, under circumstances within the knowledge of the prosecutor, which made it justifiable, it could be said that there was no probable cause for preferring that in-But I am not sure that justification in the law martial is a matter of equal certainty in its nature, so as to impute to the defendant a knowledge that he was prosecuting in a case, where, of necessity, there must be an acquittal upon the ground of justification, the fact of the charge being established. These are questions of moment and difficulty, upon which, I have already said, we have hesitated; and we shall not now give an opinion upon them; because, upon consideration, we are of opinion, that admitting, for the sake of the argument, that probable cause did appear upon this record for making a charge of disobedience of orders, it cannot operate to arrest this judgment.

The defendant is charged, by this count in the declaration, with having maliciously, and without probable cause, brought the plaintiff to a court-martial upon one entire charge, but consisting of two distinct articles under two separate articles for the government of the navy; the first, for delaying the public service; the second for disobedience of orders. I have observed that the sentence of the court-martial acquits him generally of the first. They say he did not delay the service. It is impossible therefore to find in the sentence probable cause for this part of the charge. Then it will stand thus; the plaintiff charges the defendant with having maliciously, and without probable cause, brought the plaintiff to a court-martial upon one charge, for which there was no probable cause, and

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upon another charge, for which there was probable cause; the declaration is therefore felo de se with respect to the latter, but good as to the former. In that case, after a verdict, the jury JOHNSTONE. Must be taken to have given damages for that part of the case only which is actionable. This is familiar in the case of the action for words. The words in one count may consist of several distinct paragraphs or periods, some actionable, some not; it is no objection, after a verdict, that some of the words given in evidence, and charged in that count, are not actionable; if there be actionable words to which the damages can be applied, the jury are presumed to have given their damages for the words which are actionable. It is enough to sustain a judgment upon this count, that a cause of action.appears in it; that, which does not amount to a cause of action,

is merely surplusage.

It is further objected to this count that the assignment of the special damage is ill laid. The count states, that the plaintiff lost a large sum of money, viz. 20,000l. which he would have gained, if he had not been suspended and removed from his rank and post of captain of the Isis, from prizes taken by the Isis and the other ships of the squadron, in the course of the service, and during his arrest and suspension. It is objected that there is no averment or allegation of title to prizemoney; that it does not follow from the fact stated that the prize-money was lost; that by law the prize-money was not lost, and that the jury have therefore found damages which by law could not be found. We are clearly of opinion that this objection must be over-ruled. The damages are well assigned by stating that the loss happened by reason of the wrong complained of; the rest is matter of evidence; and if any thing which can now be suggested would have proved the loss to have happened by that means, after verdict we must suppose that proof to have been given. The objection therefore resolves itself into the last branch of it, viz. that the jury have found damages which could not possibly arise in the case, and could not therefore, by law, be found. To support which proposition, it has been argued that a suspended captain is entitled to the prize-money for captures made during the time of his suspension. The proclamation must be the rule by which this point is to be decided. By the proclamation, the captain. of a King's ship, who shall be actually on board at the taking of any prize, shall have a certain proportion. Is one who had been suspended and removed from his rank and post of captain and was in that state of suspension when the prize was taken. the captain of such ship actually on board at the taking of such prize?

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prize! It is enough to state the question; it answers itself. Not having original jurisdiction in matter of prize, we cannot decide that question so as to affect the right of prize-money; but we are obliged to decide it as far as it is incidental matter against in this cause, and for the purpose of this cause. And presaising this, we hold, in this case, that the plaintiff, by reason of his suspension and removal, did lose the prize-money which he would have gained from prizes taken by the Isia and other ships during his suspension, and consequently that this is well assigned as special damage in this action.

It is objected to the third count of this declaration, the grievance complained of in which is, the refusing and neglecting to hold a court-martial for the trial of the plaintiff, while the squadron was under the defendant's command, and then keeping him under arrest till his trial in Great Britain, that this is damnum sine injuria; that the law has fixed no time. short of the term of three years, within which courts-martial are so be held and therefore it could not be the duty of the commander to hold a court-martial at any time within that per riod, or so soon as he reasonably and conveniently could after the charge exhibited, and consequently that the averments, that it was the duty of the defendant to hold such court-martial; that the defendant might reasonably and conveniently have held a court-martial; and that he wilfully, wrongfully, and injuriously, and contrary to his duty, omitted, neglected, and refused, to hold such court-martial; cannot give to the plaintiff a cause of action. The answer to this objection is, that every breach of a public duty, working wrong and loss to another, is an injury, and actionable; that the three years are only a limitation of time, beyond which no court-martial shall be held consistent with which it may be the duty of those who have power to hold courts-martial to hold them within a much shorter space. It is a familiar qualification of nowers of various kinds, that they should be executed within a reasonable time. Suspension and arrest being incident to the power of holding a court-martial, it seems an essential ingredient in such a power, and absolutely necessary to qualify the rigour of it, that it should be executed in a reasonable time; otherwise a power of holding a court-martial would necessarily involve in it a power to imprison for three years previous to the trial, which could not be borne. The usage of the navy might have made it the duty of the commander in chief, in a case where it did not speak so strongly for itself: how it becomes his duty, is to be shewn in evidence, in proof of the averment that it was his duty, and, after verdict, finding that Uuu YOL. L.

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it was his duty, must be taken to have been sufficiently prove ed. It must also be taken to have been proved that there was no impediment in the way; and under these circumstances, the not holding a court-martial, and the plaintiff's having sustained loss and damage thereby, both which circumstances we must consider as proved, constitute a good cause of action, upon which judgment may be now given.

The Court are therefore of opinion, that the rule for arrest-

ing this judgment is to be discharged.

Rule discharged,

In Michaelmas Term 1785, the Defendant brought a Writ of Error in the Exchequer-Chamber.

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Afterwards, to wit, on Tuesday the 15th day of November. in this same term, before Edw. Lord Thurlow, Ld. High Chancellor of Great Britain, there being no treasurer, in the chamber of council nigh the said exchequer, called the exchequer-chamber, comes the aforesaid G. Johnstone, by R. Fortin his attorney, and says, that in the record and proceedings, and also in the rendering the judgment aforesaid, there is manifest error in this, to wit, that by the record aforesaid it appears, that the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said Evelyn to have or maintain his said action against the said George; and so the judgment aforesaid, in form aforesaid rendered, and all the proceedings thereon, are wholly void and erroneous in law. There is also error in this, that by the record aforesaid it appears, that the judgment aforesaid, in form aforesaid rendered, was rendered for the said Evelyn against the said George, whereas, by the law of the land of this kingdom of England, that judgment ought to have been rendered for the said George against the said Evelyn. There is also manifest error in this. that, in giving the judgment aforesaid, damages have been asbessed against the said George generally for all and each of the said supposed offences in the said declaration mentioned; whereas it manifestly appears in and by the said declaration and record, that the said George had reasonable and probable cause to arrest, suspend, and bring the said Evelyn to a trial by There is also manifest error in this, that, a court-martial. in giving the judgment aforesaid, the said Barons of the Exthequer have decided upon a question not cognizable in a court of law, inasmuch as it appears, in and by the said record that

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that the said supposed offences, in the said declaration mentioned, were committed by the said George, as commander in chief of a squadron of his majesty's ships of war, in the due John stone course of discipline, and under powers legally incident to his station as such commander in chief, and whilst the said Evelyn was serving as an officer in the said squadron under the command of the said George. There is also manifest error in this, that it appears in and by the said record that damages have been assessed against the said George for the said supposed loss of prize-money by the said Evelyn; whereas the said Evelyn hath not, by reason of the said premises in the said declaration mentioned, lost or been deprived of any of the said prize-money, but is still entitled thereto. There is also manifest error in this, for that damages have been assessed against the said George for a delay in bringing the said Evelyn to trial by a court-martial; whereas, by the law of the land, an action will not lie for any such delay as is charged in the said declaration. Therefore, in that there is manifest error, the said George prays that the judgment aforesaid, for the errors aforesaid, and other the errors in the record and proceedings aforesaid being, may be reversed, &c.

This case was argued on the 2d of February 1786, at Serjeant's Inn, before Lord Mansfield, Chief Justice of the court of King's Bench, and Lord Loughborough, Chief Justice of the court of Common Pleas, by Dallas for the plaintiff in error, and Bower for the defendant; and again on the 4th of November last, at the same place, before the two Chief Justices, by Erskine for the defendant in error: Scott was to have argued for the plaintiff in error, but the Court were satisfied

upon the former argument.

## Arguments for the Plaintiff in Error.

The counsel for the plaintiff in error did not, in arguing this case, confine himself to the order in which the errors are assigned.

2d Error. "That the Barons of the Exchequer have de-2d Error. "cided upon a question not cognizable in a court of law, in-" asmuch as it appears by the record that the offences in the " declaration mentioned are charged to have been committed "by the plaintiff in error, as commander in chief of a squad-" ron of his majesty's ships of war, in the due course of dis-"cipline, and in the exercise of powers legally incident to his station as such commander, and while the defendant in er-

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" ror was serving as an officer in the said squadron under his command."

This error applies to all the counts; the relative situation of the parties being stated in each. But there being a general verdict, and the damages being generally assessed, if any one of the several counts be bad, the judgment must be reversed.

The first objection arising from the capacity in which the plaintiff in error appears to have acted, as stated on the record, and that capacity being of a public nature, and having certain duties annexed to it by law, the court will be bound to consider the precise nature of that capacity, and the legal duties consequent thereto. The commander in chief of a squadron of ships of war is bound, as such, to superintend and regulate the conduct of those under his command, to arrest and bring them to trial before a court-martial for all offences committed against the articles for the government of the navy, or the custom of the same; and if he omit to do it, where there is cause, he is himself liable to be punished for the neglect. He is, therefore, in this respect, different from any private accuser. It appears on the record that the plaintiff in error acted in this capacity; nor is it alleged that he has done any single act without legal powers, which would have made it necessary to bring a different action: but it is charged that he perverted those powers, with which by law he was invested for purposes of public utility and advantage, to the ends of malice and oppression; and that the defendant in error has thereby suffered the injury of which he complains. Notwith. standing the jury have found a verdict for the defendant in error, and that the averments in the declaration, namely, that the plaintiff in error accused the desendant falsely and maliciously, and without any reasonable or probable cause, must now be taken to be true, and that the defendant in error has sustained an injury to the extent found by the verdict, yet in point of law the judgment cannot be supported.

An action cannot be maintained against the commander in chief of a squadron of ships of war for accusing, arresting, and bringing to trial a subordinate officer, he having by law an authority so to do, notwithstanding that the perversion of his authority is made the ground of the action, as in the present case; or, in other words, an action on the case for a malicious prosecution will not lie at the suit of a subordinate, against his commanding officer, for an act done in the course of discipline, and under the powers legally incident to his situation. This doctrine is apparently repugnant to a maxim of law, that there is no wrong without a remedy; but this, though generally,

ierally, is not universally, true; and a great variety of cases xist to which it does not apply; or, at least, in which the emedy cannot be in the shape of a civil action to recover da-Johnstons nages for the injury sustained. There are many instances. n some of which it is universally held, and in others has been expressly adjudged, that an action on the case for a melicious prosecution will not lie, though the act complained of be admitted to be malicious. The principle of all such cases is, that the law will rather suffer a private mischief than a public inconvenience. As there is no adjudged case expressly in point, it must be shewn that, by analogy, and on principles of public policy and convenience, as recognized in courts of justice, this action cannot be maintained. No action will lie against a judge for any act done in his judicial capacity; nor against a grand juryman for presenting or finding a bill of indictment; nor against a petit juryman for his verdict; though the act done should be charged to be wrongful and malicious. This doctrine, and the reasons of it, are stated in the case of Floyd against Barker and others (a), where one of the defendants was one of the justices of the grand sessions in the county of Anglesea; there it was resolved by the Lord Chancellor, the two Chief Justices, the Chief Bacon, and all the Court of Star Chamber, "that when a grand inquest indicts "one of murder or felony, and after the party is acquitted. "yet no conspiracy lies for him who is acquitted against the "indictors, for this that they are returned by the sheriff, by " process of law, to make enquiry of offences upon their oath, "and it is for the service of the king and commonwealth." Stowball v. Ansell (b) was an action on the case against a juryman for maliciously indicting the plaintiff of barratry. ter a verdict for the plaintiff, on a motion in arrest of judgment, it was resolved that the action did not lie, although it was laid malitiose. From the case of Floyd and Barker it appears that the law raises a presumption in favour of jurors, and will not even admit proof to the contrary; departing herein from the common maxim, that the presumption shall only This rule must have been stand till the contrary be proved. adopted on the principle stated by Lord Coke, namely, that it would deter jurors from the public service if they were liable to such an action in every case, where, in the opinion of the parties against whom they had decided, their decision proceed-If such actions could be mained from malicious motives. tuined, the multiplicity of them would render it impossible for a judge

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` (a) 12 Rep. 23, 24.

(b) Comb. 11,

a judge or juror to discharge the duties of his office.

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exemption is, therefore, established on behalf of the public JOHNSTONE and results from principles of policy and convenience. The prosecutor of a malicious indictment is liable to an action of the case for a malicious prosecution, in preferring such an il dictment before a grand jury; yet if the same person, serving on the grand jury, were maliciously to present, or to find, such an indictment, no action would lie. Thus it is clear, that the same act, done by the same person, and proceeding from the same evil motive, is, or is not, actionable, according to his acting in a private, or a public capacity. (a) it is laid down, "that no one is liable to any prosecution "whatever, in respect of any verdict given by him in crimi-" nal matters either upon the grand or petit jury;" and he states the reason to be, " that they may not be biassed with " the fear of being harassed with vexatious suits for acting ac-"cording to their consciences." The situation of a commander in chief of a squadron of ships of war is analogous to that of a grand juror, in those respects, whereby the latter is exempted from this species of action. All the arguments of impolicy and inconvenience apply more strongly. He is a public officer, and has public duties to discharge; he must act in arduous and difficult times; he is responsible for his conduct while in command; and he is invested with legal authority over those serving under him, for public purposes. his situation he is in the nature of a public prosecutor, and it is his duty to bring offenders to trial, either on the information of others, or from his own knowledge and belief. He is himself punishable for neglect of duty, if he omit to do it where there is sufficient cause. But if this action can be maintained, the inducements would be so much stronger than in any other case, that it would be more frequently brought Such frequency would deter commanders from doing their duty, from the dread that an action would follow in every case where prisoners were acquitted. The event of actions well and ill founded would undoubtedly be different :- but the enquiry leading to the event would necessarily be vexatious and expensive. It is of more consequence that a commander in chief should have no such bias on his mind, than that a grand juror should have none. The safety of the State is declared by the act, establishing articles for the government of the navy, to depend chiefly on the discipline of the navy. ' That discipline depends principally on the chief person in commend. The

(a) Hawk. Pl. C. 191.

The safety of the State is therefore materially interested in his conduct; and he should be consequently secured from any fear of doing his duty from any possible consequences. Arguments of impolicy and inconvenience could not avail, if this were a decided case: but it is the first action of the kind; and it is to new and undecided cases that the maxim peculiarly applies, quod inconveniens est non licitum est.

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But there are other arguments of impolicy and inconvenience against this action in the case of a commander in chief for an act done in the course of discipline, namely, that every ection of this kind must necessarily involve an enquiry into subjects, which those who are to try the cause cannot reasonably be presumed to understand. It is not so in the common rase of an action for a malicious prosecution, where the jury are fully competent to that enquiry from which the malice is to appear; for the question, whether a man was maliciously indicted of any misdemeanor or felony, must be tried by perions of the same description as those who tried the original indictment. But in such a case as the present, it is otherwise. A jury cannot be supposed competent to the trial of a quesion of naval discipline, depending upon a science to which they are strangers, where the evidence must be in terms which hey cannot be reasonably supposed to understand, and conucted with habits, feelings, and principles, arising from situa ttions in life, in which they have never been placed. aw has recognized this incompetence, and made provisions accordingly, by specially constituting a tribunal, namely, a court-martial, before which offences against military or naval aw are to be tried. Then if a jury be incompetent to try he original charge, they are equally incompetent to try a ciril action, in which the sole question must be, whether that harge was properly made. In every action of this nature, he plaintiff must show that the defendant accused him malicia ously, and without any probable cause; malice of itself is not ufficient; the want of probable cause must be likewise shewn: but whether the cause were probable or not can only appear rom an investigation of the charge, and to such investigation he jury must be presumed incompetent. It is true that, upm the trial of such an action, the jury have in evidence the entence of the court-martial, acquitting the person accused: out that does not remove the objection. For, in point of law, he sentence itself is not sufficient to entitle a plaintiff to recorer; but he must lay before the jury the substance of the evilence, on which that sentence was given. For the question n such an action is, not whether the plaintiff was innocent or guilty.

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guilty, but whether the defendant acted without malice, and had reasonable and probable cause to prefer the accusation? which the sentence itself will not shew: for the plaintiff may have been perfectly innocent, and yet the defendant be justifable in having accused him; so that the charge must in ch fect be tried again by the jury, before they can give their ver-It may be said that, besides the sentence of the courtmartial and the evidence on which it was grounded, they may have the opinions of professional men: but opinion is never admitted but from the necessity of the case, and is only suffered to be produced upon this principle, that a jury must ne cessarily be presumed but imperfectly qualified to try question which depend upon knowledge they cannot be supposed u possess, but that the law has not appointed any tribunal more competent to the purpose. Thus, in cases of murder, a surgeon is examined to prove whether the wound given was the cause of the death of the deceased. So, in an action upon policy of insurance, where the question of wilful loss mises naval men may be examined as to their opinion, whether the ship was properly navigated or not. But the law has left all these questions to be decided in the common course by a ju ry, without having made (as in the present instance by the establishment of a court-martial) any special provision for another mode of trial; from which incompetence must, it point of law, be inferred. If it were otherwise, the jury might as well have tried the original charge on the evidence, assist ed with the opinions of professional men; and there is no rea son why they should not be as competent to do it in the form of a criminal accusation, as in the shape of a civil action. it be urged, as it was on the motion to arrest the judgment that this doctrine places every subordinate officer out of the protection of the law, and reduces him to a state of servile dependence on his superior officer, in favour of whom it esta blishes a despoticand uncontrollable power; the answer to it is, that the statute of the 22 Geo. 2. c. 33. (a) has expressly declared, that " if any flag-officer, &c. shall be convicted " before a court-martial, of acting in a scandalous, infamous " cruel, oppressive, and fraudulent manner, unbecoming the " character of an officer, he shall be dismissed his majesty's " service." Every officer, therefore, who suffers by the faist and malicious accusation of his commander, may bring him before a court-martial for such conduct, and procure his dis mission

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mission from the service. This is the safe-guard of subordimate officers against oppression. But it may be said, that this is no compensation to such an officer; but that the law should Jon stone enable him to recover damages proportionate to the injury. In this respect, however, he is in no worse situation than other subjects of this country, on a variety of occasions of a similar It is perfectly clear, that whatever damage may be sustained by the wrongful and malicious act of a judge, of grand or petit juror, acting as such, the party injured cannot recover a pecuniary compensation for the wrong sustained. And so in all cases where the civil injury amounts to a felomy; there, no other compensation can be recovered than what is dispensed in the form of public punishment. Every crime itteludes a private injury; every public offence involves a priwate wrong; but the atonement in such cases must be to the public, and the individual is without any civil redress. In the present instance, therefore, there is no civil redress; and the remedy must be of a criminal nature. This is the first action of this sort, notwithstanding innumerable occasions for it must have occurred. There are many instances in which courts-martial have, in their sentence, expressly declared the charge to be false and malicious. There are many others in which officers have been dismissed the service for infamous Behaviour in preferring false and malicious charges. Yet an section of this nature never before occurred. The argument of negative usage is extremely strong. In the case of Le Caux \* Eden (a) this argument was admitted to have great weight, and the language of the court in giving judgment in that case applies with peculiar force to the present. And Buller, J. there said, "An universal silence in Westminster-Hall, on a "subject which so frequently gives occasion for litigation, is a strong argument to prove that no such action can be main-"tained."

But if the court should be of opinion, that no distinction in Enor. ent be admitted between this and common actions for a malicious prosecution, still the judgment must be reversed for the first error assigned, namely, "that damages have been asseswsed against the plaintiff in error, generally, for all and each of the offences in the declaration mentioned, whereas it apet pears in and by the said declaration and record, that the et plaintiff in error had reasonable and probable cause to arer rest, suspend, and bring the defendant in error to trial be-44 fore a court-martial.

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(a) Dougl. 580.

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First, it is to be observed that, even in common cases, this action is not to be encouraged. In the case of Saville v. Ro-JOHNSTONE berts (a), Ld. Ch. J. Holt expressly said, "though this action " will lie, yet it ought not to be favoured, but managed with " great caution." The same doctrine was laid down by Ld. Ch. J. Lee, in the case of Reynolds v. Kennedy (b), and is adopted by Blackstone (c). The courts of law, in effect, exercise a control over this action, by withholding a copy of the indictment, where there is the least probable cause: and among the orders to be observed by justices of the peace, and others, at the Old Bailey sessions, prefixed to Kelung's Reports, is the following one; "that no copies of any indictment for felony be given without special order upon motion " made in open court; for the late frequency of actions " against prosecutors (which cannot be without copies of the " indictments) deterreth people from prosecuting for the king "upon just occasions." The principles of this kind of action are in some measure stated in the two cases of Saville v. Roberts, and Jones v. Gwinn (d), both which were actions for a malicious prosecution. In the former of those, Ld. Holt said. " If the indictment be found, the defendant in such action will " not be bound to shew a probable cause, but the plaintiff will 46 be constrained to shew express malice and iniquity in the " prosecution." And in the latter, Ld. Ch. J. Parker said. "The true grounds of these sort of actions are on the plain. " tiff's side, his innocence, and the damages sustained by him "through a false accusation; on the defendant's side, that "this was not an honest prosecution of justice, and a bare " mistake, but it was done in downright malice, that is, wick-" edly, and without any cause." But the law, as now settled. does not exactly agree with either of these cases. It is not necessary, as stated by Ld. Holt, that the plaintiff should prove express malice, for it may be implied from a causeless. prosecution; nor is it true, as stated by Ld. Ch. J. Parker, that the term, "malice," imports the want of probable cause, for a probable, nav even a just charge, may be preferred from a malicious motive. The true foundation of the action, as settled at this day, is to be found in the case of Farmer v. Darling (e), where it is stated, "That malice either express " or implied, and the want of probable cause, must both con-" cur to support this action." And so it was stated by Eure, Baron, on a motion for a new trial in this cause. They do not

<sup>(</sup>b) 1 Wils. 233. (a) 1 Ld. Raym. 374. (c) 3 Black. Com. 126. (d) Gilb. Cas. in Law and Eq. 185. (e) 4 Burr. 1971.

not concur in the present instance, but, on the contrary, a reasonable and probable cause is stated on the record; consequently there is wanting an essential requisite to support the Johaston E As the term "malice" does not necessarily import the want of probable cause, it is immaterial whether the malice was expressly proved, or inferred from the groundlessness of the prosecution. For if expressly proved, and there be probable cause on the record, it is not sufficient; and if there be probable cause on the record, it cannot legally be inferred. The terms in the declaration, "maliciously, and without reasonable or probable cause," are terms of legal import to be determined by the judge who tries the cause, from the evidence before the jury; or by the court from what is stated on the record. There can be no doubt as to the term " maliciously." It was so determined by all the judges in the case of the King v. Oneby (a); and in Jones v. Gwinn, Ld. Ch. J. Parker said, " malice" and " maliciously" I take to be terms of law (b). The word "reasonably" is likewise a term of Metcalf v. Hall, T. 22. law. 2 Inst. 222. Co. Lit. 56. 7. G. 3. B. R. (c). The term "probable" is merely synonymous with "reasonable;" and what is probable cause is matter of law; or, in other words, the probability of the charge preferred is to be a legal inference from the facts given in evidence before the jury, or the averments on the record. The case of Jones v. Gwinn proves this position. For there Lord Chief Justice Parker argued, that malice involved the want of probable cause, and therefore it was not necessary expressly to allege it; and he stated it as perfectly clear, that "malice" was a term of law, and therefore to be determined by the judge and not the jury. Then if malice be a term of law, and involve the want of probable cause, omne majus continet in se minus, and consequently "probable cause" must be matter of law. In Reynolds v. Kennedy (d), which was a writ of error from the King's Bench in Ireland, on a judgment in an action for a malicious prosecution, the judgment was reversed because a foundation for the prosecution appeared on the record; so that the court took upon them to judge what was a foundation, or, in other words, a probable cause. In Bull. N. P. (e) it is said, that "probable cause" for a prosecution for perjury, is " to be determined by the judge, and not the jury." It is true that there is a quare in the margin; but that doubt must now be at an end. For at the Sittings at Guildhall

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(b) Gilb. 193. (e) Vide Tindal y. (a) 2 Lord Raym. 1493. (d) 1 Wile. 232. (e) Bull. N. P. 14. Brown, ante 168, 9.

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hall after Michaelmas Term 1785, an action (a) for maliciously and without any reasonable or probable cause holding JOHNSTONE the plaintiff to bail, was tried before Buller, J. who stated to the jury that there were two questions to be determined: 1st, Whether the facts in evidence were true; 2dly, Whether, if true, they shewed a want of reasonable or probable cause: and the learned judge added, "what is reasonable or probable cause is matter of law;" and he then gave his opinion upon the case.

> The present record contains averments, which, in point of law, constitute a reasonable and probable cause; and the verdict of the jury, which is the foundation of the present judgment, is a finding of the averments on the record. In every action of this sort, the plaintiff must shew what has become of the original prosecution, either that it was deserted, or that, having been prosecuted, he was acquitted. In the prosent case, the defendant in error was acquitted: but that of itself is not sufficient to exclude the idea of reasonable and probable cause. In Jones v. Gwinn, it is said, that "the de-"termination must be such as does not admit a reasonable cause for the prosecution; as if a pardon be pleaded, which admits, " in some sort, guilt, however, it is quitting the vindication of "innocence, or justification, which admits the fact, and con-"sequently reasonable cause of complaint (b)." The defendant in error has stated in his declaration the sentence, by which he was acquitted, whereby it appears that the facts, with which he was charged, were found to be true, but justified; and consequently that there was reasonable cause of complaint.

> There are three things to be considered: 1st, The charge: 2dly, The articles, or custom of the navy, on which it was founded: 3dly. The sentence of the court-martial. charge is one entire charge, though apparently consisting of three distinct articles: 1st, Delaying and discouraging the public service. 2dly, Disobedience of orders. And, 3dly, Falling a-stern, and not keeping up in the line of battle accord. ing to the signal then aboard, &c. The first part of the charge is grounded on the 14th article for the government of the navy (c). The second article, viz. the disobedience of orders. contains a specification of what that disobedience consisted in, namely, the not causing the cables of the Isia to be cut and slipped immediately after his getting on board, &c. There are two articles in the act of parliament, namely, the 11th and the 14th, within either of which disobedience of orders

(a) Candal otherwise Barhanell v. London. (b) Gilb. 215. (c) 22 Geo. 2 a 33.

is an offence that may be capitally punished. The third charge 1786. falls within the 11th, 14th, and 22d articles; inasmuch as the signal was disobeyed by his not keeping up in the line of bat- Johnstone tle, the service was thereby delayed and discouraged, and the utmost was not done to join battle with the enemy.

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As to the first article of the charge, the court-martial find, "That it appears to them, that the prisoner did not delay or "discourage the public service on which he was ordered on " the 16th of April 1781." Supposing therefore this to be a substantive charge, and the only one against him, he would

by this sentence be fully acquitted.

With respect to the 2d article, they state, " That from the circumstances proved, and the condition the Isis was in, it "appears to the court, that the prisoner was justifiable in not " immediately cutting or slipping the cable of the Isis after " his getting on board her on that day." This finding constitutes a probable cause, or, in other words, states such appearances of guilt as rendered an enquiry necessary. It is not found, that no such orders were given, or, that being given, they were obeyed; but the prisoner is declared justifiable in not immediately cutting or slipping the cable, which negatively admits the order to have been given and disobeyed. The acquittal is therefore founded not on the falsehood of the fact charged, but on a justification resulting from a combination of circumstances. This falls expressly within the doctrine stated in Jones v. Gwinn, namely, " justification which " admits the fact, and consequently reasonable cause of com-6 plaint." Taking then the acquittal as it is, it constitutes a probable cause.

But the acquittal is in itself illegal; and the illegality appears on the face of it. It admits the order to have been given, and that the prisoner might have obeyed it, and it does not state that it was an unlawful order: the term justified imports this; for it would be an absurdity to have declared him justifiable in not having done that which it was not in his power to do. or which was against law. It cannot be disobedience, where obedience is impracticable, or legally improper, for the term implies a crime; whereas there can be no criminality in omit. ting to do what is physically impossible, or forbidden by law: and the acquittal would have been general if this had been the case. The court-martial have therefore justified disobedience to a lawful command, which is directly repugnant to the 22d article, and to the oath which they took. The justification

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fication is therefore illegal, and consequently is the strongest case of probable cause, namely, the fact found and justified, JOHNSTONE but the justification not legal. It may not be true to the utmost possible extent, that the fact being found by the sentence establishes a reasonable cause of complaint; and perhaps cases may be imagined to the contrary. But the position is, that wherever the acquittal is not general, but the accused is expressly justified, ex vi termini the sentence imports that there were appearances of guilt, and therefore probable cause. In Reynolds v. Kennedy (a), which was an action on the case for maliciously and without probable cause prosecuting for condemnation brandy, seised as forfeited, the declaration stated, that the brandy was condemned by the sub-commissioners, and that the condemnation was most justly reversed on appeal to the commissioners; the plaintiff recovered, but the judgment was arrested in the court of King's Bench in Ireland, and that judgment was affirmed here; and Lord Ch. J. Lee said, "the plaintiff has by his own declaration shewn that "the prosecution was not malicious; because the sub-com-"missioners gave judgment for him, and therefore we cannot " infer any malice in him." And so, in this case, the justifcation constituting a probable cause, and that justification being stated on the record, the court cannot presume the want of what actually appears.

As to the third part of the charge, the sentence in part admits, and in part denies, the facts it contains. The words are, "That after the wreck of the fore-top-mast had been " cleared, the prisoner did his utmost to regain his station in "the line of battle, and that the Isis was in her station about

" sun-set of that day.

The fact stated in the charge is therefore admitted, viz. that he fell a-stern, and did not keep up in the line of battle: but they find a contradiction to the charge, that he was in his station about sun-set. The words "did his utmost to regain," here again form a justification of the fact, and there is not a

full and perfect acquittal of this part of the charge.

If it be said, that, if for one part of the charge there was probable cause, for the other there was not, the declaration is felo de se with respect to the former, but good as to the latter, in which case, after verdict, the jury must be presumed to have given damages for that part only which is actionable; as in the case of an action for words, where some words in the same

(a) 1 Wils 232.

same count are actionable, and others are not: the answer to it is, that that part of the charge for which it is supposed there is no probable cause, because there is a complete acquittal, is Johnstons necessarily connected with that part, for which there is probable cause; and they are in effect one entire charge. The order given was " to cut or slip immediately," the sentence finds that the order was not obeyed; then a delay must necessarily have taken place, and the sentence is absolutely inconsistent For the delay, being a necessary consequence of the non-obedience, ought likewise to have been found and justified: but it is impossible that an order that could have been obeyed immediately, was not, and yet the non-obedience did not occasion delay. Suppose the charge of disobedience had been found, there could not possibly have been an acquittal as to the delay and discouragement. The charges depend upon each other, and the only reason why they are stated separately, and the first not made consequential to the second. was, that the charge might be adapted to the different articles established by the act of parliament.

The declaration itself does not deny that the order was given, nor aver that it was obeyed: but it does not state the order contained in the charge; it only admits, "that the Cap-" tains, &c. were thereupon ordered by the plaintiff in error " to cut or slip their cables, and put to sea after the squadron "belonging to the French king." It omits the word "immediately," in which the materiality of the order consists. Then it is averred, "that the defendant during the whole of the " 16th of April conducted himself as a gallant, obedient, and " faithful captain, and did his duty as such to the best of his "power, &c.;" and he denies that he "wilfully or willingly "disobeyed orders or signals." As to the other parts of the charge, a direct negative is put on the delay and discourage. ment: but as to the charge of falling a-stern, the denial is, \* that he did it wilfully or willingly."

The declaration having averred that the defendant in error aid his duty according to the best of his skill and ability, and the state and condition of his ship, alleges that such state and pondition was known to the plaintiff in error, and therefore it argued that, in this case, those facts, which on the sentence If the court-martial justify the defendant in error, namely, the ircumstances proved of the state and condition of his ship. ere within the knowledge of the plaintiff in error when he teferred the charge; and consequently that he accused the de-Indant in error, knowing him to be innocent. But admitting e plaintiff in error to have known all the evidence produced

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before the court-martial, the consequence does not follow that he knew the defendant in error to be innocent. Journs son a existing as were prima facie criminal, the defendant could only be acquitted by a justification; but justification is a conclusion of law, resulting from facts in evidence, and therefore not for the prosecutor, but the court, to make. This is clearly the doctrine of the common law of England. 22 Ass. 77. Fitz. N. B. 114. D. Bro. Abr. Title, Corone, pl. 89. Suppose A. preferred an indictment against B. for murder, and the jury found it manslaughter, it would not be sufficient to maintain an action for a malicious prosecution against A. for B. to aver in his declaration that A. knew the facts from which the legal inference of manslaughter was drawn.

To delay and discourage the public service, and to disober orders and signals, are offences against naval law; but, like offences against the common or statute law, may be justified by circumstances, and in like manner that justification must be made by the tribunal constituted by the law to enquire into such offences. Therefore though the plaintiff in error might know all that is alleged in the declaration he did, still, these facts requiring a justification, it was his duty to bring the defendant in error before a court-martial; it being their province to determine whether the facts amounted to a justifica-The same observations apply to the general averment in the declaration, namely, that the plaintiff in error knew the defendant to be innocent; his innocence consisting in his jus-

tification, and that justification being matter of law.

The next error assigned is, that damages have been assessed for the loss of prize money, whereas no such loss has happened by reason of the premises in the declaration mentioned.

The declaration charges that, by means of his arrest, suspension, and imprisonment, the defendant in error has lost divers sums of prize money, to which he would otherwise have This loss is therefore stated to be the consebeen entitled. quence of certain premises in the declaration specified; but as in point of law a different conclusion follows, the defeadant in error has recovered for a damage which has not havpened. The allegation of such loss from the premises mentioned is an averment of law on the record, and which therefore the judge at the trial was to decide, and not the jury; and consequently is now open for the examination of the court. In point of fact this was sustained as a question of law both at the trial and on the motion in arrest of judgment, on both which occasions it was decided against the plaintiff in error.

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But such decision is against law. The title to any prize money can only accrue under his majesty's proclamation, which being referred to in the prize act (u), must be Johnston's considered as part of the act, and is therefore before the court. The proclamation expressly directs that all prizes shall be for in Error. the benefit of officers, &c. in our pay, and of seamen, mariners, and soldiers, on board our ships, at the time of capture. The right to prize money under the proclamation consists in being in the pay of the crown, as an officer or private man, on board the ship making the capture, at the time of the cap-It is not alleged in the declaration that the defendant in error, by means of any part of the conduct of the plaintiff. ceased to be in the pay of the crown; nor is the loss of pay stated as part of the special damage: but on the contrary, by the 21st section of the 22 G. 2. c. 33. it is expressly enacted in the case of such ships as should be lost, in which case a courtmartial must be held to enquire into such loss, that if it shall appear by the sentence of the court-martial that the officers or acamen did their utmost to preserve or recover the ship, they shall be paid to the time of their discharge. Suspension does not in any case occasion the loss of pay; dismission alone can produce such an effect; and all that the declaration alleges is suspension, arrest, and imprisonment.

The next point is, whether the defendant in error was on board his ship at the time when the captures were made. But there is no averment that he was not; nor is it alleged that he was removed from his ship: the allegation is, that he was removed from his rank and post of Captain. The proclamation on which the claim to prize money depends, requires a return to be made to the commissioners of the navy of all persons actually on board at the time of the capture, and their quality. There ought therefore to have been an averment that the defendant was not on board; and the return should have been given in evidence under the act. It is clear that the substance of what is alleged in the declaration is, that prizes were made by the Isis while the defendant in error was on board, to a share of which he would have been entitled, but for his arrest, suspension, and imprisonment. No case positively determines this to be law, and reason, policy, and natural justice, are the other way. It is a principle of natural justice that no man shall suffer for that of which he is innocent: and no inconvenience can follow from the acquittal of an officer Y v.v placing Vel. L

(a) 21 Geo. 8. cl 15.4

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placing him in that situation in which he would have been, if he had not been suspended and tried. On enquiry at the Ad-JOHNSTONE miralty no case has been found; but the following note has been furnished as an extract from a manuscript book, respecting the proceedings of Admiralty and ecclesiastical courts, in the hand-writing of Sir E. Simpson, formerly king's advocate and judge of the Admiralty. "Offence-undoubted rule in "Admiralty and ecclesiastical courts, that persons suspended " for an offence supposed, of which he is afterwards acquitted " in proper court, is entitled to all the intermediate profits." "Thus in case of capture of prize at sea, the officer in arrest " being actually on board, and afterwards duly acquitted or re-" stored to his station, shall share the prize money." "So in "civil causes in Admiralty-If a master turn his mate without " just cause before the mast, and he sue for wages as mate for " the whole time, he may recover, though he did not do the "duty." "So if a clergyman be suspended ab officio et bene-" ficio, and upon an appeal declared innocent, he will recover "the profits of the living." "Profits—Person suspended from "an office entitled to intermediate profits, if innocent."

The defendant in error has therefore recovered damage on

an allegation of law which is not true.

4th Error.

The next error assigned is, that damages have been assessed for a delay in bringing the defendant in error to a courtmartial, whereas, by the law of the land, an action will not lie for any such delay as is charged in the declaration.

This error applies only to the 3d and 4th counts, which are for a non-feasance, as the 1st and 2d are for a mis-feasance.

The declaration charges that the plaintiff in error wrongfully and injuriously, and contrary to his duty as commander in chief, neglected and refused to hold a court-martial as soon as he reasonably and conveniently might. All the arguments of analogy, impolicy, inconvenience, implication of law, danger to the discipline of the navy, and negative usage, apply equally to these counts, as to the first and second. a reasonable and convenient time to hold a court-martial at sea or in port is an inquiry to which a jury are as incompetent, as to examine what constitutes a reasonable and probable cause for a prosecution against naval law, and for the same reasons. There is no instance of such an action having hitherto been brought.

But there is this further and most material objection. first and second counts are founded on the innocence of the defendant in error, established by the sentence of a competent tribunal:

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tribunal; the third and fourth on the guilt of the plaintiff in error without any charge having been preferred, or trial had, before any such tribunal. To support the first and second JOHNSTONE counts it was necessary for the plaintiff to allege his acquittal; to uphold the third and fourth he ought, by a parity of reason, in Error. to aver the defendant's conviction. The neglect to hold a court-martial is a military offence, and ought to have been tried by a court-martial: but to bring an action for such neglect in the first instance is, in effect, to make a jury try the original charge. The first and second counts aver that the defendant in error was acquitted: but there is no allegation in the third and fourth that the plaintiff in error was convicted of the neglect charged. The same reasons would recur to prevent this action, even if the plaintiff in error had been tried for the supposed neglect by a court-martial, and acquitted thereof, as have been urged against the first and second counts, founded upon the acquittal of the defendant in error.

But, supposing these reasons to be over-ruled, this additional objection will remain, which is also peculiar to the 3d

and 4th counts.

The declaration charges, first, that it was the duty of the plaintiff in error, as commander in chief, to have held a courtmartial as soon as he reasonably and conveniently could. 2dly, That he might have held a court-martial, there being, during the whole suspension, a competent number of officers belonging to the squadron to compose such court. Now this averment is insufficient; and the insufficiency is of the substance of the action. It is an action against a public officer for a breach of duty, in the execution of his office; and it is of the substance of the action to state in what that breach consists. To have stated that it was his duty to have held a court martial as soon as he reasonably could, would not have been sufficient, without alleging that he had the power; and the breach of duty consisting in not using the power he had, that power must be expressly shewn to prove the breach of duty. To see whence the power to hold courts-martial must be derived, recourse must be had to the 22 Geo. 2. c. 33; the sixth section of which gives the lords of the Admiralty power to grant commissions to any commanding officer to call and assemble courts-martial, consisting of commanders and captains. this it appears that the power of assembling a court-martial is not necessarily incident to the office of commander in chief. but must be derived from a commission to be granted by the commissioners of the admiralty. The averment is therefore bad.

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bad, that it was his duty as commander in chief. The plaistiff in error could not, within this clause, have the power to JOHNSTONE hold a court martial without such commission; and if so, it ought to have been expressly averred, that he had such commission. To enable him to hold a court-martial two things were necessary; 1st, That he had a commission, giving him such authority; 2dly, That there were a competent number of officers. The second is alleged, but not the first; so this it is not shewn that he had the power, for there might be a competent number of officers, and yet be no commission comferring authority to hold a court. The ninth section of the statute, which only provides for the accidental meeting of fire ships in foreign parts, is not applicable to the present case.

The declaration alleging that it was his duty as comman der of a squadron to have assembled a court-martial, and the power to hold such a court depending upon the law of the land, the court must look to the act of parliament to find whether, as commander, it was his duty; and the law being clearly otherwise, and that which confers the authority, namely, a commission, not being alleged, there is no authority shews.

On the second argument, Scatt suggested to the court, that (supposing the action to lie) if some of the counts in the deck ration were not good in point of law, a court of error could not award a venire facias de novo, after a general verdict found, even though one of the counts were good, which was sufficient to warrant a judgment; but that the judgment must be either affirmed or reversed. He admitted that the case of Astle v. Grant (a) decided the reverse of that proposition: but he observed that that determination was not warranted by the old authorities. For in all the former cases (b), where a court of error had awarded a venire fucias de novo, there either had been a special or imperfect hading by the jury, and not a general and perfect verdict.

## Arguments for the Defendant in Error.

1st Brror.

The 1st error assumes the action to be maintainable, if the plaintiff in error maliciously, and without reasonable or probable COMM.

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<sup>(</sup>a) Dougl. 703. (b' The following seem to be the most material authorities on the subject, and of which even denies that a court of error can in any case award a venire de avo. 2 Ro. Abr. 721. pl. 10. 2 Ro. Abr. 722. pl. 16, 18, 19. Bro. Abr. sit. Venire facias. pl. 12. 21 Hen 6. 20. pl. 38, 39. Sep. 34. 64. 205. 307. 335. 645. 2 Buletr. 32. 2 Ld. Raym. 1521. 2 Stra. 1053. 1055. 1124. 1. Wile. 55. 4 Brown's App. 280. Comp. 89. 91. Lougl. 361.; and Coppinger v. Keating, M.

puer, did arrest, suspend, and bring the defendant to trial: ut it alleges that a reasonable and probable cause for such rrest, suspension, and trial, appears on the face of the re-Jourstone ord.

This probable cause is argued to appear on the record from in Error. he charge, and the manner in which the defendant in error appears to have been acquitted of it, namely, not from the facts on which it was framed being negatived by the sentence of the court, but from a justification of his conduct having been made to appear from circumstances shewn to the court in evidence: from whence it is argued, that the existence of the facts on which the charge was founded, leaves probable cause. the answers to that argument are, first, that no probable cause for any of the charges does appear upon the record from the language of the sentence of the court-martial, by which the defendant in error is acquitted of them; much less, when coupled with the antecedent part of the record. Secondly, that in the utmost latitude of construction of the language of the semence, and the utmost extent of the argument founded on it, the probable cause could extend but to one of the charges; the facts of the others being expressly negatived. action would have been maintainable for the other two, independently of the third, the court will, after verdict, intend that the jury gave their damages for those charges which were actionable.

As to the first, to support the present action, there must be malice express, or implied, and a want of probable cause. What is malice express cannot be misunderstood. Malice implied can only be implied from circumstances; and the total want of a probable cause is evidence of malice. If it can be shewn that a prosecutor knew the party prosecuted to be innocent, prosecuting under that impression is decisive proof of malice; for it could not be from public motives. fore is probable cause is the great matter for consideration. The definition of probable cause is such conduct in an individual accused as will warrant a legal and reasonable suspicion of offence against the law in the mind of the person accusing, so as that a court can infer a prosecution to have been taken up on public motives. It is a mixed question of fact and law. What circumstances existed, and what knowledge the prosecutor had of them, is a question of fact: but when the facts are known, and the mind of the prosecutor is laid open to the jury by evidence, then whether it were a reasonable or unreasonable cause of proceeding is a question of law.

But

But it is a clear maxim, that no man who prosecutes and

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ther for a crime, believing him to be wholly innocent of it, JOHNSTONE can, if the party be acquitted, lay hold of a technical probable cause from future circumstances. It matters not whether the party prosecuted be acquitted of the offence from the facts of the charge not being proved, or from a justification, taking them to exist, if the prosecutor were acquainted with the fact, and the just effect of such justification arising out of it before he proceeded. As for instance, if a commander in chief, whose signal had been disobeyed, knew that the officer disobeying it did it from such motives as made the disobedience perfectly justifiable in the officer, and was convinced of his rectitude; such commander could not suspend and try him merely because the defence (which is known to him) must come from the officer himself in the shape of a justification. The plaintiff in error must therefore establish that there is sufficient on the face of the record to shew positively that he acted upon a reasonable and legal ground of suspicion of guilt, to entitle him to legal protection for having prosecuted, notwithstanding his malicious motive, which stands admitted by the averment, stating that he did it maliciously. It will not be sufficient that it should stand indifferent on the sentence, whether there was probable cause for one charge, or not; for the declaration having averred that the plaintiff in error brought the defendant to trial without any reasonable or probable cause, and the jury having found it, the want of that probable cause, so distinctly averred, must be taken to exist, unless the record contain matter repugnant to such averment. And the record must be construed, like all other legal instruments, ut res magis valeat quam pereat; the sentence must be reconciled with the averment, if they be reconcilable in language. In order to determine whether there be any matter directly repugnant to the averment, it is necessary to examine the record, viz. the two first counts, to which only the objection applies. The declaration avers that although the defendant in error during the whole of the engagement, &c. conducted himself as a gallant officer, and did his duty to the best of his power, considering the state of his ship, and was never guilty of any of the charges particularly specified, yet that the plaintiff in error well knowing the premises, (namely, the innocence and merit of the defendant in error, which was antecedently averred in the declaration,) but, maliciously, and without any reasonable or probable cause, suspended, arrest. ed,

ed, imprisoned and brought him to trial for delaying and discouraging the public service, for disobeying the commodore's verbal orders and public signals in not causing the cables of Johnston B the Isis to be slipped immediately, &c. and also for falling a. stern. &c. of which the declaration had averred him to be in- in Error. nocent, and innocent within the knowledge of the plaintiff in error.

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The first part of the sentence, namely, that he did not delay and discourage the public service, is an express negative, not only of the first charge in form, but of all in substance; for if the defendant in error did not only delay or discourage the public service, he could not be guilty of any of the charges. The second part of the sentence, namely, that, from the circumstances proved of the condition of the Isis, the defendant in error was justifiable in not cutting or slipping his cable immediately, means, that, the defendant in error having acted rightly in not immediately cutting or slipping his cable, his not doing it was not in naval law or discipline a disobedience. It makes no difference whether the impossibility of obeying The conduct of the defendant in error be physical or moral. cannot be considered as a disobedience of the commodore's orders, but an obedience to the spirit, and a legal and justifiable dispensation with the strict form, of the order. It was so considered by the final adjudication going to all the charges; for the court-martial honourably acquitted him of the whole of They considered justifiable conduct as opposed the charge. to disobedience. But even taking it to be a disobedience completely justified, not excused, and that the plaintiff in error knew the fact constituting the justification, it is sufficient. And the court will not now presume that the condition of the ship, which constituted the justification, or its effect, as a justification, was unknown to the plaintiff in error. For the record excludes the presumption of ignorance. It is not necessary for the defendant in error to shew from the declaration that the commodore had not probable cause; but the plaintiff in error must shew that, on the record, he certainly had. For there is a positive averment that he had not, and the whole record must be construed together if reconcileable. In the case of Reynolds v. Kennedy, there was no averment that the defendant had no probable cause, or that he well knew the premises; and the judgment in that case was very proper; for though the information was false, yet the defendant might have had probable cause. There, non constat, that the charge was false within the defendant's knowledge; here it is positively averin Error.

1786. red; in that case there was a condemnation; in the present a direct acquittal. And the present record contains share lowerone averments for the want of which the judgment was arrested against in that case.

The second answer to the argument (for the plaintiff, in error is, that the probable cause (supposing the area answer to be unfounded) extends at the utmost to the second charge, and -leaves the first and third defenceless; the facts of them being negatived. And after verdict the court must intend that the damages were given for them only. The court of exchequer had no difficulty in that part of the case (a). Wherever she injury is charged to have been committed at one and the same time, and the matters, in which such injury is charged to consist, appear, some to be actionable, and others ust, the court will presume after verdict that the damages were given for the actionable part. That the law is so in the case of words spoken is clear from O.berne's case, 10 Go. 1804 Braughton's : case, Moor 142. Brook v. Glerk. Gro. Eliz.: 388. Thaxbie v. Smith, Cro. Eliz. 788. Penson v. Goodhay, Cro. Car. The same rule likewise holds in trespass. In Smaller v. Kerfoot and Wife (b) where trespass was brought against baron and feme for breaking and entering the plaintiff's house, taking his goods, and converting them to their own use, a motion was made in arrest of judgment, that the feme could not convert to her own use: but the court presumed that the damages were given for breaking the house, and taking the So in actions of assumpsit. 2: Rol. Rep. 79. - So in covenant, where several breaches are assigned, some being insensible, and general damages are given, they are presumed to have been given for those which are good. 1 Rol. Abr. 577. It cannot be contended that, supposing probable cause appeared for any of the charges, it would destroy the action es to the others, for the others might be considered as surplusage. It is true, that if the substance of a crime be laid various ways, in order-to meet accurately the circumstances as they may appear in proof, and the defendant be acquitted, but there was probable cause for the accusation, as laid in one count, no action would lie for the charges in the other. But if a person, having a probable cause to accuse another of one offence. charge him at the same time with another, totally independent of the first, and of which he knew that other person to be perfectly innocent, and the person accused be acquitted of all,

(a) Ante, 509.

(b) 2 Stra. 1094.

the probable cause for one charge does not repel the action for the malicious accusation of the other. Suppose the plaintiff in error had probable cause for accusing the defendant of Johnstons disobeying his order, in not instantly cutting his cable, which the sentence does not negative as false within his knowledge; but as justified, yet that does not give him any probable cause for accusing him of falling a-stern after he did cut his cable, and not keeping up in the line of battle, or for charging him with being out of his station at sun-set; the truth of which charges the sentence negatives; and the falsehood of which the declaration avers, together with the plaintiff's perfect knowledge of their falsehood. In the case of the King v. Pressen, which was an indictment for perjury, on the prosecution of Nixon, the perjury was charged to have been committed in an answer in Chancery to the prosecutor's amended bill. The substance of a verbal agreement for a lease of some premises at Paddington was set forth in the amended bill: the defendant denied such agreement, and stated it another way. The indictment contained thirty-three assignments of perjury, one of which was for denying the agreement for the lease. defence against that assignment, the prosecutor's original bill was produced, and his instructions for drawing it in his own hand, by which he had stated it to be exactly as Prosser did in his answer. The defendant, after being acquitted of all the charges, brought an action against Prosser for a malicious prosecution; who, on the trial of that action, called many witnesses to prove that he had probable cause for many of the charges; but the plaintiff relied on this single charge, which the defendant himself knew to be false. Lord Mansfield, before hom the cause was tried, told the jury, that the instructions in the hand-writing of the defendant for the original bill left him defenceless against that charge of perjury, whatever probable cause he had for others; and the jury found a verdiet for the plaintiff with 100% damages. The malicious charge in the present case was one act, though it contained independent members. But if any member of such charge appears not to be actionable on the record, and the others do, the court ought to presume, as in actions for words, that the judge at Nisi Prius did not admit any evidence relative to that, and that no damages were given for such charge.

2d Error. It cannot be denied as a general proposition 2d Error. that whenever any subject of England suffers any damages from any illegal or injurious act of another, short of felony,

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the law gives him a remedy by civil action, and without any previous conviction of the act. And in this case it is not Johustons contended that the injurious act complained of is a felony. It appears by Lord Chief Justice Holt's argument, in Saville v. Roberts, that, if a man be falsely and maliciously indicted of any crime that may prejudice his fame, or property, or may subject him to peril of life or liberty, he may bring his action, for he is falsely scandalized by the malice of the prosecutor. If, therefore, this action is not maintainable in principle or substance, supposing it properly brought in point of form, it is an exception to a general rule of law. The general rule of law supporting the action, the exception must be established by the plaintiff in error; and that exception must go the length of saying, that an officer in the navy forfeits or voluntarily surrenders all the civil rights belonging to other subjects, when the injury proceeds from a superior officer, under colour of discipline; even although the act done be admitted to have been done in opposition to discipline, in violation of naval duty, maliciously, and without cause. This can only be established by a current of direct authorities, or the silence of precedents. which shew that the analogies and the policy of the law war. rant the conclusion.

As to the first, no case, or even dictum, can be shewn, to prove that an action for a malicious prosecution cannot be maintained against an officer for the abuse of the authority de-

legated to him by the King's commission.

As to the latter, it has been contended that the action capnot be supported on account of the dangerous consequences to the public, and by analogy to other cases. It is true, that the public is deeply interested in protecting all righteous prosecutors of civil offences from the consequences of mistaken judgments. But such protection is sufficiently afforded to all subjects by the arduous proof thrown on plaintiffs seeking this sort of redress; and not by holding out a previous indemnity to malignity, cruelty, and injustice. The supposed analogies are the superior Judges of the realm; grand jurors finding indictments; petty jurors trying them; and the Attorney General prosecuting ex officio for the Crown. But the exemption contended for extends beyond the analogies; it does not confine itself to superior officers, but runs through all the classes of naval subordination.

But

But the principle contended for only protects the judges of the King's courts of record (a). The principle is obvious with respect to them: there is no court equal to the trial of Jonns round the superior judges of the realm for facts done in judicature. But the plaintiff in error cannot be considered in the situation of a judge. If the question had been, whether an action for a malicious judgment would lie against a member of a courtmartial, acting within his jurisdiction, there might have been some analogy; but the plaintiff in error is to be considered rather in the light of a prosecutor than a judge.

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As to grand and petit jurors in criminal cases, their exemption arises from a jealousy of prerogative; it would have been dangerous in the extreme to have allowed an attaint for the King; and it would have been impossible to have given an attaint for the subject, and none for the King. But in ci-

vil cases an attaint lies.

No case can be cited to shew that the attorney-general would not be civilly answerable for a corrupt abuse of discretion; the argument is proving ignotum per ignotius; and on principle and strong analogy he is answerable. The protection given to persons acting for the public is in no cases extended farther than to officers concerned in the revenue, who are frequently obliged to act on slender suspicions, and would otherwise be open to endless prosecutions. In the case of Boot v. Cooper and another (b), which was an action of trespass against an officer of excise for entering under a warrant of two commissioners founded on the 10 Geo. 1. c. 10. into the plaintiff's house to search for concealed goods, the Court held that the defendants were not trespassers, even though they found nothing in the plaintiff's house, the act itself being legal; but that the only remedy was by an action on the case for obtaining or executing the warrant from bad motives.

By analogy to those actions which have been brought against governors of provinces, islands, and garrisons, military officers, and even officers of the navy, it is clear that this action

is maintainable.

The admission that actions of trespass vi et armis may be maintained for acts of officers in the navy or army, not even acting from malice, but mistaking the extent and limits of their authority, cuts up the great question of policy by the roots. It was so considered by the Barons of the Exchequer

when

(b) E. 25 G. S. B. R.

<sup>(</sup>a) Miller v. Seare, 2 Block. Rep. 1141.

against Ser ron in Kitter.

when judgment was given below. The action of treepass supposes the act complained of to be illegal, and if the defen-JOHANTONE dant justifies, the whole burthen of proof is thrown on him; for he must make out his justification. In this kind of action the plaintiff is bound to state his whole case on the record: and unless he proves every part of it, he cannot recover. But at all events the form of the action does not alter the neture of the thing, for which an action is maintainable. action on the case is brought for one of two reasons, either that the injury is consequential, or, if direct, that the act, though legal, was from a bad motive. In the present case the bad motive is the gist of the action. Every principle which the court laid down in the case of Fabrigas v. Mostyn (a) is applicable to the present. And the language made use of by Ld. Mansfield in the case of Wall v. M. Namera (1) is particularly strong. That was an action brought by the plaintiff, as Captain in the African corps, against the defendant, as Lieutenant Governor of Senegambia, for imprisoning him for nine months at Gambia in Africa. The defendant pleaded the general issue, intending to justify the imprison. ment under the mutiny act for disobedience of orders. the trial it appeared that the imprisonment, which at first was legal, namely, for leaving his post without leave from his reperior officer, though in a bad state of health, was aggravated with many circumstances of cruelty. Ld. Munsfield, in some ming up to the jury, said, "In trying the legality of acas "done by military officers in the exercise of their duty, par-"ticularly beyond the seas, where cases may occur without "the possibility of application for proper advice, great lini-" tude ought to allowed, and they ought not to suffer for a " slip of form, if their intention appears by the evidence to " have been upright; it is the same as when complaints are w brought against inferior civil magistrates, such as instites " of the peace, for acts done by them in the exercise of their "civil duty. There the principal enquiry to be made, by a " court of justice, is, how the heart stood? And if there are " pears to be nothing wrong there, great latitude will be al-4 lowed for misapprehension or mistake. But on the when " hand, if the heart is wrong, if cruelty, malice, and continued " sion, appear to have occasioned or aggravated the impri-" sonment or other injury complained of, they shall not cover " them-

(a) Coup. 161.

(h) Sittings at West. after Mich. 1779.

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"themselves with the thin veil of legal forms, nor escape, " under the cover of a justification the most technically re-"gular, from that punishment which it is your province and Johnstone "your duty to inflict on so scandalous an abuse of public "trust. It is admitted that the plaintiff was to blame in "leaving his post. But there was no enemy--no mutiny--" no danger--His health was declining, and he trusted to the " benevolence of the defendant to consider the circumstances "under which he acted. But supposing it to have been the " defendant's duty to call him to a military account for his " misconduct, what apology is there for denying him the use " of the common air in a sultry climate, and shutting him up " in a gloomy prison, where there was no possibility of bring-" ing him to a trial for several months, there not being a suf-"ficient number of officers to form a court-martial? These "circumstances, independent of the direct evidence of ma-"lice, as sworn to by one of the witnesses, are sufficient for " you to presume a bad malignant motive in the defendant, "which would destroy his justification, had it even been " within the powers delegated to the defendant by his com-" mission (a)."

So that where an officer makes a slip in form, great latitude ought to be allowed; but for a corrupt abuse of authority none can be made. Yet according to the argument for the plaintiff in error, no latitude is afforded to the first, and absolute im-

punity to the last.

Swinton v. Molloy (b), was an action of false imprisonment brought by the plaintiff as purser of the Trident man of war against the defendant, who was his captain. The defendant pleaded a justification for a supposed breach of duty. But it appearing in evidence that the defendant had imprisoned him for three days without enquiring into the matter, and had then released him on hearing his defence, Ld. Mansfield said, that such conduct on the part of the defendant did not appear to have been a proper discharge of his duty, and therefore that his justification had failed him under the discipline of the navy. But suppose that Capt. Molloy, instead of releasing the plaintiff on hearing his defence, had kept him confined till he came to England, and had then made a charge against him in order to justify himself, the same policy which suffered an action of false imprisonment in that case for the incautious, though

<sup>(</sup>a) In this case there was a verdict for the plaintiff, damages 1000/.

<sup>(</sup>b) Sittings after M. 1783, at Westm. cor. Ld. Mansfield.

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though upright, conduct of the defendant, would have sun. ported an action on the case founded on cool deliberate malice JOHNSTONE and injustice, not covered by a pretence of discipline.

The analogy between the present case and that of Sutherland v. Murray (a) is very strong to shew that a person representing the King in all functions, civil and military, where the act complained of is expressly legal, shall answer for an abuse of his authority. There the declaration stated that the defendant was governor of Minorca, and vice-admiral of the island, that the plaintiff was judge of the Vice-Admiralty Court, with all fees, emoluments, &c. and that the defendant, to injure and oppress him, maliciously, and without any reasonable or probable cause, suspended him from his office, per quod he lost his profits, &c. On the evidence it appeared that General Murray had legal authority to suspend till the king's pleasure was known; that he had so suspended him, and directed the Secretary of State to take the king's pleasure on The General professed himself ready to restore him if he made a particular apology; the king approved of the suspension, unless the terms were complied with. There the plaintiff recovered 5000l. and it never occurred to any lawyer that there was any pretence to move in arrest of judgment. The gist of the action was admitting the legality of the suspension thus confirmed, but complaining of the defendant's exercise of his original authority, and his malicious and false representations, by which the suspension had been confirmed.

The argument on the incompètency of juries, to try questions of this nature, is not entitled to much weight, when it is considered that almost all the injuries which one individual may receive from another, and which are the foundation of numberless actions, involve in them questions peculiar to the trades and conditions of the parties: and if this argument were well founded, such actions could never be tried. In an action against a surgeon for ignorance, the question may turn on a nice point of surgery: but the jury must attend to the witnesses, and decide according to their number, professional skill, and cause of knowledge; for cuilibet in sua arte credendum est. In an action on a warranty of a life in a policy, physicians must be examined. So for injuries on streams to one mill by another, mill-wrights and engineers

<sup>(</sup>a) Sittings at West. after East. 1783, cor. Eyre, Baron. That action was twice tried, the first verdict being imperfect; and the damages were given on the second trial.

1786.

against

SUTTON

in Error.

neers must be produced. Many questions even of navigation must occur, which must necessarily be decided by a jury; as in a case under the Hovering act, when unavoidable necessity JOHNSTONE is to exculpate; --- so in cases of deviation on policy of insurance;--or in cases of sea-worthiness;--or when one ship runs down another at sea by bad steering. Yet those actions are much more difficult, because they depend solely on questions of navigation. But the gist of the present action is malice, and want of probable cause, which cannot involve any question of navigation and sea-fighting; and the present verdict was not founded on any such evidence.

But if jurors are not competent to try such a question, the plaintiff is without any remedy at all. A court-martial can give no redress to the injured party. As to the case of Le Caux v. Eden, which was cited for the plaintiff in error, there the imprisonment complained of was an immediate consequence of seizing a vessel as prize. And the question of prize or no prize, and its immediate consequences, are notoriously of Admiralty jurisdiction. But the court, in that case, went principally on the Admiralty having jurisdiction to redress the parties in damages.

As to any objection that may arise to an action of this sort before a defendant has been tried and convicted by a courtmartial under the thirty-third article of war; that argument holds in no case short of felony. For if it were to prevail in the present case, it might, with the same reason, be extended to many others; as, for instance, no action would lie for maliciously holding to bail without a previous conviction for

perjury.

The extreme difficulty which stands in a plaintiff's way, in this kind of action, is an answer to the supposed impolicy of entertaining it. The knowledge that no action lies for any injury, except from malice and injustice, while it can never check the conduct of good men, may form a check on the But even if it be impolitic to entertain actions of this nature, it is a legislative, not a judicial, duty to repel it.

3d Error. The loss of prize money for prizes taken while 3d Error. Captain Lumley (who was appointed to succeed to the defendant in error) commanded the Lis, during the suspension of the defendant in error, is charged upon the record as a legal consequence of that suspension. This is assigned as error, and it is illeged that that suspension did not carry that legal consequence; the defendant in error being entitled by a species of jus postliminii

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minii to all those rights which would have belonged to him if

.1786. against SUTTON in Error.

he had never been accused, suspended, and tried. But the JOHNSTONE defendant in error can have no prize-money but what he is entitled to under the king's proclamation. Now the proclamation gives the captain, who shall be actually on board on the taking of any prize, three-eighths. The term "actually on board" has repeatedly received a legal construction. It does not mean merely personally on board; but on board in the actual station and capacity in which the prize-money is claimed. And therefore the proclamation requires the captain and other officers to make out and subscribe prize lists, stating the quality of the persons on board, and to transmit them to the commissioners of the navy. The real meaning of the proclamation in this particular underwent a solemn discussion in the case of Wemys v. Linzee and another (a), where it was determined, by the court granting a new trial, that a captain of marines, who happened to be on board a frigate when she took a prize, but did not belong to her complement, should share only as a passenger. If that decision be right, the defendant is not entitled to any part of the prizes taken after his auspension. For Captain Lumley was to all intents and purposes Captain of the Isis, and actually on board as Captain when the prize was taken. Indeed, according to the doctrine of the jus postliminis, the defendant in error is entitled to his pay as well as prize-money during his suspension; in which case Captain Leemley had no title to receive it; for both could not But as the plaintiff in error undoubtedly had authority to appoint Captain Lumley to the office of Captain with all the emoluments, the consequence is unavoidable, that Captain Lumley was entitled, during the whole time he commanded the Isis, to all the advantages which the law gives to the Captain of a ship, and consequently to the prizes in question. Neither does it appear on the record that, when the prizes in dispute were taken, the defendant in error was actually on board; and if he were not on board, he could not share even if captain. No jue postliminii therefore can attach in the present case, without destroying the effect of Captain Lumley's commission both as to prize-money and pay, and reducing him to lose both in every station. For he had left his former ship, and could not share there because he was not on board, and his place was supplied; and if he did not take prize-money as Captain of the Lis he could not share in any other capacity on board her, nor in any capacity at all on board any other ship in

(a) Dougl. 310.

aga net

the squadron. So that he would suffer an actual punishment and loss from an appointment to a legal commission; for the pay and prize-money cannot belong to both. JOH MSTONE

4th Error. It cannot be contended that, because an officer SUTTON, is not amenable to a court-martial after three years, no action in Error. can be maintained against a commanding officer for delaying contrary to his duty to bring an inferior officer to trial within 4th Error. that time. The gist of the two last counts, as well as of the others, is mala fides—oppression and injustice in the exercise of a leg 1 discretion. The action is not therefore trespass, because the law authorizes the act; but it does not protect mulam fidem in the exercise of legal authority. It would be a harsh construction of a statute of limitation in favour of officers subject to trial, to engraft upon it a right in superior officers to hold with impunity an inferior three years in confinement disgraced and suspended, when discipline and convenience justified a trial and enlargement immediately. If a commanding officer has this time in strictness of law, it may be an answer to an action of trespass, which calls the mere legality of the act in question, but is no answer to an action which impeaches the motive. For although a commander may have a right to detain an inferior officer accused in custody for three years, it may be, under circumstances, highly injurious and contrary to his duty to do so. The jealousy of the law in that respect, is strongly marked in the habeas corpus act, and the regular commissions of general gaol delivery.

The third and fourth counts sufficiently charge makem fidem. And there is no precise form necessary in an action on the case, as in a writ of conspiracy. In Jones v. Gwyn, Ch. J. Parker said, " a formed action must be strictly pursued : but " an action on the case allows a latitude, and makes nothing "necessary but what the reason of the case makes so." Surely then if a person maliciously contriving to injure his neighbour, acts wilfully, injuriously, and contrary to his duty, that is in reason a charge of malice, and the action on the case requires no technical form. The jury having found that an earlier trial was reasonable, convenient, and just, and that the defendant contrary to his duty, wilfully, and injuriously, withheld it, the court cannot reverse the judgment for error without saying that, because the exigency of naval conjunctures may render it necessary for a commander in chief to keep an inferior officer suspended, and in confinement for trial for three years, he is not responsible to civil justice Vol. I.

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1786. for running to the end of that time, when humanity, justice,

duty, and discipline, called for an immediate trial.

Joh stone
against
Surton,
in Error

But if this argument be not tenable, and the third and fourth counts are bad, the utmost consequence is a venire facias de novo. For, where it appears by one count, that the plaintiff may maintain his action, but there is one or more counts bad, and the verdict general, a court of error may and ought to grant a venire facias de novo. Astle v. Grant. Dougl. 731.

The use of the venire facias de novo is to cure the uncertainty of damages given by a general verdict, which assesses them on the whole declaration, when it appears that the plaintiff is not entitled to judgment on all the counts. Where it does not appear upon the record that the plaintiff has established any cause of action, so as to be entitled to any judgment, then judgment is of course arrested. But when it appears on the record that the plaintiff has stated in one or more counts a clear and legal cause of action, and the jury have found the facts which compose that cause of action to be true, so as to entitle him to a judgment on those counts which state them, but that the uncertainty arises from the damages not being appropriated by the jury specifically to such good counts, but to others also which are not good in law, then the judgment cannot be arrested in toto, nor the plaintiff driven to a new action. But he must be sent again to trial on the same record to take the sense of a jury on that part of it alone which is good. The reason for awarding a venire facias de novo appears stronger in the present instance than in general, because the first and second counts of this declaration have no connexion with the third and fourth, but are brought for the redress of injuries totally distinct and independent.

5th Error.

In answer to the fifth error, that it is not shewn upon the record that the plaintiff in error had authority to assemble a court-martial, which renders the charge of delaying it defective.—In the first place it is not assigned specially as error; but even if it had been it deserves no weight in this stage of the proceeding. The third count, after stating the charge, the arrest, and suspension until a court-martial could be had, avers, that although it was the duty of the said George, as such commander, to hold the court as soon as he reasonably and conveniently could; and although the defendant as commander in chief might reasonably and conveniently have held the court while the squadron continued at Port Praya, yet the defendant, well knowing that a court might

might reasonably and conveniently be assembled, and that it was his duty to hold it) but contriving, and wrongfully, injuriously, and maliciously intending to aggrieve, oppress, and injure, Johnstone the plaintiff, &c. he, the defendant, wilfully, wrong fully, against initialization, injuriously, and contrary to his duty, omitted, neglected, and in Error, refused, to hold a court-martial at Port Praya, &c. and thereby wilfully, wrongfully, injuriously, and contrary to his duty, kept the plaintiff imprisoned and suspended until his trial and acquittal in *England*, by which, &c.

On this record it was argued for the plaintiff in error that it does not appear that he had authority to hold a court-martial: which want of power must arise either from his not having a commission to hold one, or that there was not a sufficient number of officers. But this objection is raised after a verdict. And the rule after verdict, which is perfectly settled and understood by a variety of cases since the statutes of Jeofails, is, that where the plaintiff wholly omits to set forth the gist of his action or his title to recover, it is an incurable defect in substance; but if he set it forth generally, though without those circumstances which go to its formation and constitution, such circumstances as are necessary to establish the gist of the action, which is generally alleged, are to be presumed to have been proved at the trial, as otherwise the plaintiff must have been nonsuited. Dougl. 658. Salk. 130. Cro. Car. 497. 2 Jones 145. 1 Mod. 169. Carth. 130. 1 Sid. 423. 1 Ventr. 34. 119. 123. Hardr. 221. Rep. Tem. Hardw. 116. Stra. 212. and Trial per Pais 285 (a).

In the present case it is a strained presumption, and contrary to the fact, that the plaintiff in error had no authority to hold a court-martial. Upon this record the court is bound to take notice of the situation of the parties. And it is scarcely possible to suppose that the lords of the Admiralty would neglect to insert in the commission of a commander in chief the usual power to hold courts-martial. For it is so much a matter of course to give a commander in chief that power, that in case of his death, or removal, his successor succeeds to that power under the sixth section of the 22 Geo. 2. c. 33.

Besides, the general averment, that the plaintiff in error wrongfully, wilfully, and contrary to his duty, omitted to hold the court, made it necessary for the defendant in error to shew that it was the commodore's duty to hold it, which could not be

done.

(a) Ante 145.

JOHNS 1 Is against Surron, in Error.

done, without proving that he had authority to hold it, and that there was a sufficient number of officers with him to enable him to exercise his authority. It falls therefore within the principle of all the cases ited. If he had neither authority nor numbers, his act was neither wrongful, wilful, or contrary to his duty; neither could the averment be true, that he reasonably and conveniently could have held it.

As the verdict therefore is general, the court cannot but presume that those facts were proved, without which not a single averment in the third count could have been established.

The following are the Reasons on which the Opinion of Lord Mansfield, and Lord Loughborough, in the case of Johnstone v. Sutton, was founded; reported to the Lord Chancellor, and delivered to his Lordship, who permitted the Purties to take Copies.

By the course of proceeding no use could be made of them in the Exchequer Chamber; but the Chief Justices were desirous that their reasons for differing with the Court of Exchequer should be authentically known, and took this method of doing it.

Reasons for reversing the judg-ment.

On the 2d day of February last we heard this cause argued by counsel on both sides; and upon the 4th instant we heard it again fully argued by the counsel for Captain Sutton the defendant in error, and the plaintiff in the cause.

The record is printed, and in every body's hands; there is

therefore no occasion to state it.

The general question is, whether, upon the face of the declaration, after a verdict, sufficient matter appears to shew

that the plaintiff ought not to recover?

There is no similitude or analogy between an action of trespass, or false imprisonment, and this kind of action. An action of trespass is for the defendant's having done that, which, upon the stating of it, is manifestly illegal. This kind of action is for a prosecution, which, upon the stating of it, is manifestly legal,

The essential ground of this action is, that a legal prosecution was carried on without a probable cause. We say this is emphatically the essential ground; because every other allegation may be implied from this: but this must be substantive-

ly and expressly proved, and cannot be implied.

From

From the want of probable cause, malice may be, and most commonly is, implied. The knowledge of the defendant is also implied.

JOHNSTONS. against

SULTON.

in Error.

From the most express malice, the want of probable cause

cannot be implied.

A man, from a malicious motive, may take up a prosecution for real guilt, or he may, from circumstances which he really believes, proceed upon apparent guilt; and in neither case is

he liable to this kind of action (a).

After a verdict the presumption is, that such parts of the declaration, without proof of which the plaintiff ought not to have had a verdict, were proved to the satisfaction of the jury. In this case, to support the verdict, there was nothing necessary to be proved, but that there was no probable cause, from whence the jury might imply malice, and might imply that the defendant knew there was no probable cause.

The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to shew it probable, or not probable, are true and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause is a question of law: and upon this distinction proceed-

ed the case of Reynolds and Kennedy, 1 Wils. 232.

Thus much we think fit to premise in general, as a material introduction to the discussion of the question upon this record.

The objections made by Johnstone, the defendant in the cause, come under two general heads.

First, Supposing this kind of action to lie.

Secondly, That it does not lie.

First, Supposing it to lie, the defendant has made the following objections:

To the first count,

1st Objection, That there appears upon record a probable cause in law.

2d, That the declaration alleges, by way of special damage, as a legal consequence of the plaintiff's suspension, that he lost his share of the prize-money acquired by the ship during his suspension; which the defendant says is not true.

Upon the third count it is objected that it is not alleged that the defendant had a commission to hold courts-martial, and as

commander in chief he had no such authority.

2dly,

(a) Vide Warren v. Matthews, 6 Mod. 73.

2dly, That not holding a court-martial sooner, if any, is a mere military offence, contrary to the duty of the defendant,

Johnstone as commander; and the guilt has not been tried by any military tribunal, and in this respect is like the case of Barwis and Keppel, 2 Wils. 314.

As to the first objection under the first head;

The charges against the plaintiff before the court-martial were formally two; but in reality and effect, one; to wit, the disobedience of the defendant's verbal orders, public signals, &c.

The second charge is a consequence of the first, viz. for delaying and discouraging the public service on which he was ordered on the 16th of April 1781; which delaying or discouraging arose from his not doing as he was ordered, no other

instance being alleged.

The flight, the signals, the attempt to pursue, the enemy sailing off, are all admitted by the declaration. That the orders were, in fact, not obeyed, seems admitted too; for the plaintiff only avers "that he did not wilfully and willingly disobey;" but the sentence of the court-martial shews clearly that the orders were disobeyed, and that the plaintiff justified himself by a physical impossibility to obey. Nothing less could be a justification.

A subordinate officer must not judge of the danger, propriety, expediency, or consequence of the order he receives: he must obey; nothing can excuse him but a physical impossibility. A forlorn hope is devoted—many gallant officers have been devoted. Fleets have been saved, and victories obtained, by ordering particular ships upon desperate services, with almost

a certainty of death or capture.

The question then tried by the court-martial was, whether the plaintiff was justified in not obeying by physical impossibility? Now there cannot be a question more complicated. It involves the precise point of time; the state of the wind; the state of the ship; the position of both fleets. It requires great skill in navigation. There is no question likely to create a greater variety of opinions.

It is possible, the court-martial at *Portsmouth*, at a great distance of time, may have thought it was impossible to obey; and yet the whole squadron, who saw the action, might be of a different opinion. We use it only as a possible supposition; but we are warranted to make it, by a matter of fact, which

it seems came out upon the trial of this cause.

In

In the printed notes of my Lord Chief Baron's argument upon granting a new trial, his Lordship says, " that all the " sea officers, those examined for the plaintiff, as well as Johnstons "those who were examined for the defendant, swore they " should have held themselves bound to obey the orders giv-"en, if they had been in the situation in which the plaintiff " was."

Under all these circumstances, it being clear that the orders were given, heard, and understood; that in fact they were not obeyed; that by not being obeyed, the enemy were enabled the better to sail off; that the defence was an impossibility to obey—A most complicated point—Under all these circumstances, we have no difficulty to give our opinion, that, in law, the commodore had a probable cause to bring the plaintiff to a fair and impartial trial.

This probable cause goes to both parts of the charge; the disobedience, and obstructing the public service. But if it went to the disobedience only, it would equally avail the defendant in this cause. For it is not like the case put of a plaintiff recovering, where he lays, in the same sentence.

words actionable, and words not actionable.

Here the defendant alleges a justification of the arrest, suspension, and trial. If his justification be allowed, there is an end of the action.

If the defendant were right in trying the plaintiff for disobedience, the adding delay and obstructing the public service, were only two or three superfluous words, which created no additional trouble, vexation, or expence; and this action is not adapted to so trifling a complaint.

Second objection under the first head.

The right to the prize-money in this case is, we understand, still in litigation between the plaintiff and others, who are no parties in this cause; and therefore, without necessity, we choose to give no opinion upon it: and if our opinion is right upon the other points, this is not necessary.

The third count is upon a ground collateral to the prosecution. It is for delaying to hold a court-martial for the trial of the plaintiff, while the squadron under the defendant's command continued abroad, contrary to the duty of his of-

fice as commander in chief.

Objections have been made to the plaintiff's recovering upon this count:

1st. That

186. 1st. That it doth not appear upon the declaration, that he had authority to hold a court-martial.

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2dly, That the offence, as charged, is merely military, and contrary to the discipline of the navy; and the defendant has not yet been tried for it by a court-martial.

3dly, Alleging loss of prize-money as a special damage. We have already said why we decline giving any opinion up-

on this.

As to the first, the averment is, that by law it was incident to the duty of his office to hold a court-martial: now the contrary is manifest from the statute law of the land. There is no fact to be tried by the jury. The allegation is a proposition in law, and stands upon the record. It is false, and therefore the basis of the charge, that the defendant had authority, is wanting; and this objection we think fatal.

As to the second objection; the delay is charged to be contrary to the defendant's duty as commander in chief. There is no rule of the common or statute law applicable to this case. It is a mere military offence. It is the abuse of a military discretionary power; and the defendant has not been

tried for it by a court-martial.

A court of common law in such a case, cannot assume an original jurisdiction. It is like the case of Barvis and Kep-

pel. This objection we think fatal.

This is our opinion upon the first, second, third and fourth counts, supposing an action for a groundless prosecution before a court-martial to lie; and upon this opinion no question will arise whether or not there should be a venire de novo.

But the great and important question now brought into judgment for the first time, is, whether such an action can

lie ?

The occasion has often arisen at different periods of time, when men of the fleets, put upon their trials before a court-martial, have thought the charge without a probable cause, and have warmly felt the injury of such an act of malice or oppression: yet, till this experiment, it never entered into any man's head, that such an action as this could be brought; consequently there is no usage precedent, or authority, in support of it.

This case stands upon its own special ground.

The wisdom of ages hath formed a sea military code, which in the last reign was collected and digested into an act of parliament. The great object of this code is, that the duty of every man in the fleet shall be prescribed and regu-

.

lated by rules and ordinances adapted to sea military discipline; and that every man in the fleet for any offence against his duty in that capacity or relation, shall be tried by a court-Johnstona martial.

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in Error.

If a man be charged with an offence against the articles, or where the articles are silent, against the usage of the navy, his guilt or innocence can only be tried by a court-martial.

A commander in chief has a discretionary power, by this military code, to arrest, suspend, and put any man of the fleet upon his trial. A court-martial alone can judge of the charge. But this military law hath foreseen that though it is necessaty to give superiors great discretionary power, it may be abused to oppression; and therefore has provided against such abuse by the 33d article.

A commander who arrests, suspends, and puts a man on his trial without a probable cause, is guilty within that article: but the same jurisdiction which tries the original charge, must try the probable cause; which in effect is a new trial. And every reason which requires the original charge to be tried by a military jurisdiction, equally holds to try the probable cause by that jurisdiction.

The salvation of this country depends upon the discipline of the fleet; without discipline they would be a rabble, dangerous only to their friends, and harmless to the enemy.

Commanders, in a day of battle, must act upon delicate suspicions; upon the evidence of their own eye; they must give desperate commands; they must require instantaneous obedience. In case of a general misbehaviour, they may be forced to suspend several officers, and put others in their places.

A military tribunal is capable of feeling all these circumstances, and understanding that the first, second, and third part of a soldier is obedience. But what condition will a commander be in, if, upon the exercising of his authority, he is liable to be tried by a common law judicature?

If this action is admitted, every acquittal before a court-

martial will produce one.

Not knowing the law, or the rules of evidence, no commander or superior officer will dare to act; their inferiors will insult and threaten them.

The relaxation and decay of discipline in the fleet has been severely felt upon an unsuccessful battle, there are mutual recriminations, mutual charges, and mutual trials. The whole Vol. I. Bbbb Acct

fleet take sides with great animosity-Party prejudices mix -If every trial is to be followed by an action, it is easy to see JOHNSTONE how endless the confusion, how infinite the mischief will be.

against SUTTON in Error.

The person unjustly accused is not without his remedy. he has the properest among military men. Reparation is done to him by an acquittal. And he who accused him unjustly is blasted for ever, and dismissed the service.

These considerations incline us to lean against introducing this action. But there is no authority of any kind either way; and there is no principle to be drawn from the analogy of other cases, which is applicable to trials by a sea court-martial under the marine law, confirmed, directed, and authorized by statute. And therefore it must be owned that the question is doubtful: and when a judgment shall depend upon a decision of this question, it is fit to be settled by the highest authority.

According to our opinion it is not necessary to the judgment in this cause. Because, supposing the action to lie, we think

judgment ought to be given for the defendant (a).

The judgment was accordingly reversed by the Lord Chancellor (b).

(a) The plaintiff in Error.

(b) Post. 784. This judgment of Reversal confirmed in Dom. Proc. See 1 Bro. P. C. (800 ed.) 76.

END OF MICHAELMAS TERM.

## CASES

#### ARGUED AND DETERMINED

IN THE

# COURT OF KING'S BENCH,

#### HILARY TERM.

IN THE TWENTY-SEVENTH YEAR OF THE REIGN OF GEORGE III.

In the course of the last Vacation, and in this Term, several Changes took place on the Bench and at the

- In the vacation, Sir John Skynner, Knight, Lord Chief Ba-
- ron of the Court of Exchequer, resigned.

  On the 14th of January 1787, died, at his house in Lincoln's Inn Fields, Edward Willes, Esquire, one of the Justices of this Court.

On the 26th of January 1787, Sir James Eyre, Knight, was appointed Lord Chief Baron of the Exchequer.

On the 9th of February 1787, Nash Grose, one of his Majesty's Serjeants at law, kissed hands on being knighted; on the same day he was appointed one of the Justices of this court, and on the 10th took his place on the Bench.

On the 7th of February 1787, Alexander Thomson, Esquire, one of the Masters in Chancery, and Accomptant General, kissed hands on being knighted, and on the 9th of February was called to the degree of Serjeant at law, and gave rings with this motto " Reverentia legum": And on the same day he was appointed one of the Barons of the Exchequer.

On the 9th of February 1787, Simon Le Blanc and Soulden Lawrence, both of the Inner Temple, Esquires, were called to the degree of Serjeants at law, and gave rings

with this motto "Reverentia legum."

Wednesday, Jan. 24th.

The KING against The Sheriss of CORNWALL.

A rule call- HIS was a rule to shew cause why a writ of attachment, ing on a shewhich had issued against the defendant for his contempt riff to return a writ issued in not returning a writ of attachment issued against James in the vaca- Tippet in a cause of Daw and Smith, should not be set aside tion, though for irregularity. The defendant had been served with a rule tested in the to return the writ, (which had issued against James Tippet,) succeeding term, is ir- at Helstone in Cornwall, on the 7th of November last; that regular; and rule was dated on the 6th of November, but in fact was issuan attached before the commencement of the term. And the princiment, pal question (for there were two others which were not degrounded upon it, will termined), was, whether a rule, issued in the vacation, though be set aside by he court tested in the succeeding term, calling on the sheriff to return on motion. a writ, was properly issued.

Lawrence, in support of the rule, Cowper and Morgan against it.

Per Curiam (a). This is not like a little slip made by the party, which does not affect the general practice of the court, and which the court would not be disposed to attend to. But it is a new practice adopted by the officers, without the knowledge of the court; and therefore they must put a stop to it in future. A rule thus obtained is false in itself, irregular, and improper. A rule to a sheriff, calling on him to return a writ, presupposes some neglect in him, and consequently should not issue till he has actually been guilty of some omission. But here the officer of the court has taken upon himself to prejudge the sheriff, and because he supposed that the sheriff would be guilty of a default, has issued the rule.

Rule absolute.

(a) Lord Mansfield was not able to attend the whole of this Term.

Tbursday, J.n. 25th, DARBY against COSENS, Clerk.

NOTLEY against The Same.

Where a modes in peaded in an ecclesias- plaintiffs in the ecclesiastical court of the Dean of the cathed court, a prehabon

may be entired at any time before final sentence. A prohibition will be granted to a court of appeal, aftere it appears that they have no jurisdiction over the subject matter, even after they have counted the suit to the court below, and awarded costs against the appellant, and though the party applying for a prohibition appealed to that court.

DA BY

COSENS.

dral church of Sarum for tithes. The plaintiff pleaded the following modus, or prescriptive or customary payments, which he stated to have been paid immemorially, namely, 2s. 10d. for the farm and lands called Whitehouse farm, and 6s. for a farm and lands, called Hutchins, (being the same estate for the tithes of which the plaintiff was libelled,) in lieu of all vicarial tithes, and tithable matters within and upon the said farms; payable at Lady-day yearly. On the 2d of July 1785, there was an interlocutory decree in the decanal consistorial court of Sarum, that the answer of the present plaintiff to the third and fifth articles of the libel, which were for agistment tithes, and the tithes of the produce of a garden and orchard, was not sufficiently full, and that the plaintiff should make a fuller answer to those articles. From this he appealed to the Arches court of Canterbury, when Dr. Calvert, official principal of the said court, on the 11th of July 1786, pronounced the present plaintiff's answer to the third and fifth articles of the libel not to be sufficiently full and explicit; remitted the cause to the court below; and condemned the plaintiff in the costs of the appeal.

The plaintiff Notley pleaded a similar modus, in lieu of the vicarial tithes for his lands: And, upon a decree in the Dean's court that his answer was insufficient, he likewise appealed to the court of Arches, where his appeal was dismissed in the same manner as that of the plaintiff (Darby), and he was also condemned to pay the costs of the appeal.

In last *Michaelmas* term the plaintiff *Darby* obtained a rule to shew cause why a writ of prohibition should not issue to prohibit the court Christian of the Dean of the cathedral church of *Sarum* from further holding plea of the matter there depending between the parties.

The plaintiff Notley obtained a similar rule for a prohibition

to the court of Arches.

The court desiring that both these rules should be heard

together;

Piggot and Lawrence now shewed cause. Where an inferior court has original cognizance of a cause, it has been decided in many cases that, if a party applies for a prohibition after sentence, he comes too late. Argyle v. Hunt, 1 Str. 187. In the present case, the libel being for tithes, the Dean's court had original jurisdiction of the suit. And though,

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though, after pleading the modus, the plaintiff might have applied for a prohibition, yet by making no objection to the jurisdiction of the court till after the interlocutory decree, and thereby putting the defendant to a great and unnecessary expence, he has precluded himself from applying for a prohibition now. In the case of Full against Hutchins (a), the true distinction is taken by Lord Mansfield between those cases where the court will or will not grant a prohibition; and it was there held that after a party has lain by, and suffered the ecclesiastical court to proceed to sentence, a prohibition ought not to be granted, if the court below had original jurisdiction Here it does not appear that the Dean's court of the cause. determined upon the modus: They only decreed that the answer was not sufficient; from whence it is fairly to be inferred that the only question before them was respecting the form of the proceeding, of which they were the sole judges. As the court of Arches decided that the decree of the Dean's court was just, it being a question properly brought before them, this court will give credit to them for having rightly determined that point, without enquiring into the reasons on which that sentence was founded. And it is to be observed that the court of Arches likewise decreed the plaintiff's anower to be insufficient, which shows that they also considered it as a question of form.

As to the prohibition to the court of Arches, this application is also too late. That court after confirming the sentence below, condemned the party in costs, and remitted the cause to the dean's court: so that the suit is no longer in that court, except as to the costs: and a prohibition cannot bow be granted to deprive the defendant of those costs, which were awarded to him by a court having a competent juris-Besides it is the sole province of that court to adjudge costs against a party unjustly appealing, provided the appeal be properly brought before them; and the plaintiff is precluded from objecting to the competency of that court, he having himself appealed to it. But even supposing that the court of Arches were wrong in their judgment, and that they ought not to have awarded costs to the defendant, a court of common law cannot revise their decision upon that point, because the party might have appealed to the court of Dele-And where a party has a remedy by appeal, no gre-

hibition lies. 2 Rol. Abr. 319. n. 1.

Douglass in support of the rules was stopped by the court. ASHBURST.

(a) Comp. 422.

ASHHURST, J.—In my opinion this court even in this stage of the business must grant a prohibition to both the courts.

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It is very clear that an ecclesiastical court cannot proceed in any cause where they have not an original jurisdiction of the subject matter; and if they do, a prohibition goes of course; or where any incidental matter intervenes by which they are ousted of their original jurisdiction, in that case also a prohibition must go. Now I take that to be the case here; for though there is no doubt but that the ecclesiastical court have an original jurisdiction over matters of tithes, yet the instant the modus was pleaded, their jurisdiction was at an end.

It has been said that this is only an interlocutory decree as to the insufficiency of the plea in point of form. If the sentence had proceeded on the ground of a mere matter of form. I do not say what the court would do: but here it does not appear that this is a mere matter of form; for they judge the answer to be insufficient generally as to two of the articles. And therefore we must exercise our own judgment, and examine whether on the face of the proceedings the plea appears to be insufficient. Now it does not appear to me to be insufficient; for the plea states that the modes is in lieu of the vicarial tithes; and that is an answer to the whole charge contained in the libel. If the court below could by an interlocutory decree adjudge the answer to be insufficient generally without assigning any reason for their opinion, it would preclude this court from granting a prohibition in any case. But this court will not suffer their hands to be tied up by such means.

With regard to the prohibition to the court of Arches; although the plaintiff might have made his application to this court sooner, I do not see why we should not even now grant the prohibition. Costs are merely incidental to the original matter; and if we put a stop to the original suit, we must do so to all the subsequent proceedings. And matter sufficient appearing for this court to interfere and oust the ecclesiastical court of their jurisdiction, I am of opinion that a prohibition should go to both the courts.

BULLER, J.—Before a party is entitled to a prohibition, it is incumbent on him to suggest what has been done in the court below. When that suggestion is entered on record, if it state facts which are not true, the other party should move to quash it: but if they be not impeached, the court must take them to be true. Now this case stands thus; To a suit instituted

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instituted in the ecclesiastical court the party pleaded a modus which covered the whole farm; he has pleaded it in terms that can admit of no doubt. And the only remaining question must be as to the existence in fact of the modus pleaded; and that it was so pleaded below is not contradicted. if we judge on these proceedings, they will not support the arguments used by the counsel against the rules, that both the courts below held this plea to be bad in point of form; it is not sufficient for them to say so, but they should have shewn in what respect it was defective in form. It is not stated for what reason the courts below held the plea to be insufficient; and as the plea is stated on the suggestion, it is right in point Then it appears to us that a modus was properly pleaded to the whole libel, which ousts the ecclesiastical court of their jurisdiction; and that is the ground on which this court will grant a prohibition. It is not necessary for the party to apply in the first instance for a prohibition; if he make an application any time before sentence, he is in time: No other line can be drawn. The argument which the counsel against the rule have used, namely, that the only object of this application is to prevent the defendant from recovering the costs to which he is entitled under the sentence of the court of Arches, is no objection to our granting the writ; that argu. ment was much relied on in the case of Whitford against Wilson (a) where the parties had gone to a great length in the ecclesiastical court, before they applied to this court for a prohibition: but the court there said, if the party came before sentence, it was in time. As to the case cited from Rolle's Abridgment, in which it is said that no prohibition lies, if there be a remedy by way of appeal; it relates only to those cases where the suit below was proper; therefore it is not applicable here, for this is a case, where, though the ecclesiastical court had originally jurisdiction, yet when the modus was pleaded they were ousted of their jurisdiction. The prohibition is merely for the purpose of trying the modus; for the party applying must declare in prohibition, and if the jury find against the modus, I take it a consultation goes of course. And then the ecclesiastical court will perhaps be justified in considering the costs in all the stages of the proceeding.

With respect to the other rule for a prohibition to the court of Arches: The suggestion states that the proceedings are now depending in that court; for though a sentence has been given, yet the costs have not been paid, and they are now proceeding

(a) E. 26 G. 3, B. R.

to compel payment of the casts. Then they are in fact proceeding in this suit. And therefore a prohibition must go to both the courts.

Both rules absolute.

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And the Court ordered the plaintiffs to declare in prohibition.

#### IAQUES against WITHY.

Friday 7an. 26th.

ASE for money had and received, money lent and ad-Where a vanced, &c. Plea, set off \$40% upon a judgment rcco-prisoner in execution is vered in Trinity term, in the 22d year, &c. by the defendant discharged against the plaintiff in this court, which is still in force and by the conunsatisfied.

The plaintiff in his replication admitted the judgment, &c. upon giving but said that the defendant in Michaelmas term in the 23d year, a fresh se-Se. in order to obtain satisfaction of the said judgment, charge curity to ed him in execution of the said judgment in the custody of the judgment, marshal of the Marshalsea, &c. and kept and detained him in and that sesuch custody, and in execution of the said judgment, until the curity is Such custody, and in execution of the said judgment, afterwards 6th of February 1783, when he was by and with the consent, afterwards defeated on privity, authority, and license of the defendant, and by his or account of der and direction, released and enlarged from and out of the said a mere incuatedy, and wholly discharged from the said execution at the formality, suit of the defendant of and upon the said judgment.

Rejoinder, That the plaintiff on the 28th of February 1783, satisfied, at his instance and request, was by and with the consent, pri- and cannot, vity, authority and licence of the defendant, and by his order be set off and direction, released and enlarged from and out of the said against a custody, &c. and discharged from the said execution of the the prisoner. said suit of the defendant of and upon the said judgment so recovered, &c. for and in consideration of the plaintiff's then and there making and delivering to the defendant a certain writing obligatory, bearing date the 28th of February 1783, in 681% with a condition to satisfy the judgment either by instalments or by an annuity, and also for and in consideration of a warrant of attorney, executed by the plaintiff on the 28th of February 1783, given to the defendant to confess judgment upon the said writing obligatory in the court of our lord That afterwards and within twenthe king of the Bench. ty days of the execution of the said writing obligatory, and warrant of attorney, (to wit,) on the 18th day of March 1783, the defendant, according to the form of the statute, Vol. I. Cccc. caused

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caused a memorial to be inrolled in chancery, of and concerning an annuity, secured by a bond and warrant of attorney to confess judgment thereon in his majesty's court of King's Bench, executed by the plaintiff, in the penal sum of 6811. in consideration of the sum of 3401. 10s. paid to the plaintiff by the defendant for one annuity of 50l, to be paid to the defendant by the plaintiff during his life. That the plaintiff, after the granting of the said annuity to the defendant, made default of payment therein. And thereupon the defendant, by virtue of the said warrant of attorney in Hilary term in the 26th year, &c. signed judgment upon the said writing obligatory against the plaintiff in the court of Common Pleas. And afterwards in the said Hilary term sued and prosecuted out of the same court a writ of fieri facias, directed to the sheriff of Middlesex, who executed it. That afterwards in Easter term in the 26th year,  $\mathfrak{S}c$ , the plaintiff obtained a rule in the court of **Common** Pleas to shew cause why the judgment signed by the defendant against the plaintiff, and the writ of execution issued thereon and executed, &c. and all proceedings in that cause subsequent to the said judgment, should not be set aside, and the bond and warrant of attorney brought into court and delivered up to the plaintiff to be cancelled, and the goods, &c. levied under the execution, restored to the plaintiff, and why the defendant should not pay the costs of all these proceedings; which rule was made absolute in the same Easter term. That the said court of Common Pleas so ordered the said writing obligatory and warrant of attorney to be delivered up to be cancelled by reason of a mistake, informality, and irregularity, in the said memorial, that is to say, by reason of the said warrant of attorney being therein expressed to be a warrant of attorney to confess judgment in his majesty's court of King's Bench, instead of his majesty's court of Common Pleas, and by reason of the consideration of the said writing obligatory and warrant of attorney being expressed to be for 340% 10s. paid to the said plaintiff, instead of expressing it to be in coasideration of the said judgment for that sum.

To this rejoinder there was a general demurrer, and joinder in demurrer.

Morgan was to have argued in support of the demurrer, but the court desired to hear the other side.

Wood, cantra, admitted as a general position, that where a person is once taken in execution and discharged, he cannot

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be sued again for the same debt. But he contended that that was not universally true, and that under the particular circumstances of this case, the debt due from the plaintiff to the defendant was not extinguished. An execution against the person of a defendant is not in all cases a satisfaction of a debt; for if he escape out of custody when charged in execution, it is clear that an action may be maintained on the judgment, because it is by the defendant's act only that he obtains his discharge. The same rule likewise holds if that discharge be obtained by fraud. Now in this case the discharge granted by the defendant was not voluntary, but it was on a consideration which has failed; and therefore the discharge cannot operate as a bar, or extinguish the debt. This is like the case where a judgment on a simple contract is reversed by a writ of error, the simple contract still remains, and an action may be maintained on the assumpsit. So if an execution be set aside for irregularity, the plaintiff may sue out another.

ASHHURST, J. There must be judgment for the plaintiff in the present case. I cannot pretend to say how far a court of equity would interfere in this case; and indeed the defendant seems to have some ground for claiming relief. But, at all events, the discharge from the execution is certainly a discharge at law. I know of only one case where a debtor in execution, who obtains his liberty, may afterwards be taken again for the same debt, and that is where he has escaped; but the reason of that is because he was not legully out of custody. But where a prisoner obtains his discharge with the consent of the party who put him in execution, he cannot be retaken. In the present case, the plaintiff trusted to the other security, and therefore he cannot resort to the first security again.

BULLER, J. The counsel for the defendant has relied only on the equity of the case; and that advantage has been taken of a mere slip. It is not material for us to consider whether a conscientious man would have taken this advantage: the truth is, there is a flat objection under an act of parliament (a), of which the plaintiff is entitled to take the benefit. The facts are, that the plaintiff, being in execution at the suit of the defendant, was discharged by him on giving a bond and warrant of attorney, with security, at the time it was given, was good. Therefore the plaintiff was not guilty of any fraud. But the objection is, that the requisites of the act not having

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Judgment for the plaintiff (b).

(a) 4 Bwr. 2482.

(b) Birch.v. Sharland, post. 715.

Wednerday, Yen. 24th.

#### SENHOUSE against CHRISTIAN and Others.

Under the grant of a free and convenient way for the purpose of carrying coals, among other articles, the grantee has a right to waggonway. Under a grant oof a way B. in, tbrough, ana along a parthe grantee is not justified in making traus verse road across the

same.

HIS was an action of trespass, which was tried at the last Assizes holden at Carlisle, for the county of Cumberland, before Heath, I.

The first count of the declaration stated that the defendants broke and entered the plaintiff's close called the Slip of Land, otherwise the Lane, in the township of Ellenborough, in the county of Cumberland, extending in a direct line from the scite of a certain uncient bridge or steps at the bottom of a certain close, theretofore called the New Close, to a certain part of the king's common highway, leading between Flimby and Netherlay a framed hall, in the said county, and besides committing trespasses with cattle and carriages, dug and made divers large pits, holes, hollows, and trenches therein, and put, fixed, laid, and placed, divers large pieces of wood as well in the said pits, from 4. to holes, hollows, and trenches, as elsewhere, in, upon, and throughout the said close, for the purpose of fixing and making, and thereby and therewith fixed and made, in and upon ticular way, the said close, two framed waggon-ways for coals, the one thereof in a straight direction, leading lengthways along the said Close from North to South, the other thereof in a transverse direction, and extending towards the North-west end of the said close, from and out of the said close unto and into the

the Northernmost of two closes, called Grasslett, adjoining thereto towards the West; and kept and continued the same, &c. And also pulled down and destroyed certain posts and SEMMOUSE rails, erected in the said close, near the North-west end there- Chairtan of, in that part thereof where the transverse waggon-way passed out of the Slip of Land into the Northernmost Grasslett, and carried away the wood and iron coming therefrom. There was another general count for carrying away wood, iron, &c.

To this declaration the defendants pleaded, first, the general issue. 2dly, As to the trespasses in the first count mentioned, (except such as related to the fixing and using the framed waggon-way in the transverse direction), that one Humphrey Senhouse being seised of the said close called the Slip of Land, otherwise the Lane, by an indenture between him and one John Christian, Esq. deceased, the grandfather of the defendant Christian, granted and confirmed unto the said John Christian deceased, his heirs and assigns, " a free and conve-" nient way, as well an horseway as a footway, as also for carts, " waggons, wains, and other carriages whatsoever, in, through, " over, and along, the aforesaid Slip of Land, leading from the " steps or bridge at the bottom of the said close called the New "Close, to the common highway aforesaid, leading between "Flimby and Netherhall, with full and free licence to make "and lay causeways, or otherwise to repair and amend the " same, when and as often as there should be occasion; to-" gether with full and free licence to and for the said John "Christian deceased, his heirs and assigns, his and their "workmen, agents, and servants, from time to time, to make "use of and enjoy the said way, on foot or on horseback, and "with wains, carts, and waggons, or any other carriages, and "with full and free liberty by all or any of the ways or carri-" ages aforesaid, to lead and carry stone, wood, timber, iron, "bricks, tiles, gravel, lime, coal, or other thing or things "whatsoever, in, through, over and along the said way, when, "whither, as often, and in what manner to him the said gran-"tee, his heirs and assigns, it should seem convenient." That the grantee, by virtue of this deed, became seised of the said way in gross. That the same upon his death descended to Evan Christian, as his son and heir, and upon the death of Evan, to one John Christian, as the brother and heir of Evan; and from the last mentioned John Christian upon his death, to the present defendant Christian, as his son and heir, who, in his own right, and the other defendants, as his servants, justify under this deed passing along the way thereby granted in

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the manner complained of in the declaration, and justify also making the pits, holes, hollows, and trenches, mentioned in Senhouse the declaration, in order to repair and amend the said way, and as being proper and convenient for the purpose of laying therein certain pieces of wood; the putting, fixing, laying, and placing of which pieces of wood in the said pits, holes, hollows, and trenches, and elsewhere in the said close in the said way, they likewise justify, for the purpose of fixing and making in the said close the first of the said framed waggon-ways mentioned in the declaration, and thereby and therewith repairing and amending the said way, the same being alleged by them to be a reasonable, proper and convenient way of repairing the same, for the carrying of coals, and other things, along the same, pursuant and according to the form and effect of the said indenture, and the said grant of the same way. They likewise justify the pulling down and destroying the posts and rails mentioned in the declaration, as obstructing the said way.

> The third plea was the same as the second, only that it justified the fixing and using the framed waggon-way in thet ransverse direction out of the slip of land in question into the Northernmost Grasslett belonging to the defendant Christian, as well as the waggon-way laid in a straight direction along the slip of land; and to which latter way only the former jus-

tification was confined.

To the first of the special pleas, the plaintiff, by way of new assignment, replied that the defendants, besides committing trespasses extra viam, and at other times, and upon other occasions, than when they had occasion to use the said way, and for other purposes than for the use thereof, dug, and made the pits, holes, hollows, and trenches complained of, at other times, and upon other occasions, than when the same way granted in and by the said indenture stood in need of and required reparation and amendment, and for other purposes than for the purpose of repairing and amending the same way; and that such pits, &c. for the digging, &c. whereof this action was brought, were other than such as were proper and convenient in that behalf, and that the first mentioned framed waggonway fixed and made in the said close was other than such whereby or wherewith the said way in and by the said indenture granted, was or could be repaired or amended, and that the fixing and making of such framed waggon way, for which this action was brought, was an unreasonable, improper, and inconvenient way of repairing and amending the same way,

and not pursuant or according to the tenor and effect of the said indenture and the said grant of the same way.

There was the like new assignment as to the second special plea, only adding that part of one of the framed waggon-ways, in that plea mentioned, was wholly out of the way in and by the said indenture granted.

To each of these new assignments the defendants pleaded the general issue.

On the trial a verdict was found for the plaintiff, with one shilling damages, subject to the opinion of the court on a case, which stated in substance as follows:

That by an indenture dated 18th May 1722, and made between H. Senhouse of the one part, and J. Christian of the other part, he the said H. Senhouse granted to the said J. Christian, his heirs and assigns for ever, "a free and convenient way, &c." in the words of the first plea of justification. contained a covenant by Christian, that he would repair the hedges and fences by him newly erected along the sides of the said way, and the wall and gate at the end thereof; a covenant by Senhouse, that he would not subvert with ploughs, &c. the said slip of ground, or do any thing, whereby the way in, through, over and along the same, should be straightened, or rendered or made founderous or less convenient to and for the said 7. Christian; and a proviso that nothing therein contained should be construed or taken to hinder Senhouse, his heirs and assigns, from depasturing the said piece of ground, or making use of the said way, in such manner, and with such carriages, as to him and them should seem expedient, they the said H. Senhouse and J. Christian, their heirs and assigns, during such time as he and they should so use the same, being each at one moiety or half part of the charge in repairing thereof. The case then stated that Senhouse, the grantor, by indenture dated 8d December 1737, leased to one J. Collin all the pasturage, herbage, and feeding of the slip of land in question for twenty-one years; in which deed was a proviso, that if Collin should erect any gate or gates across the said piece or parcel of ground, he should cause the said gate to be made seven and an half feet broad. That the whole of the lease was prepared, written and attested, by J. Christian, the grantee, and grandfather of the defendant.

The case then stated several deeds between these and other parties, respecting the working of certain collieries at Broughton, in the neighbourhood of the slip of land in question, which the

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the court did not think material to the present question. The case further stated, that a framed waggon-way was first made we over the slip of land in question by the Broughton Colliery Company in the year 1758 under those deeds, CHRIST has always, since the making of such framed waggon-way, been left on the East side another road of width enough for carts with coals to pass along; but such carts meeting cannot pass each other in most parts of the said road, on the side of the framed waggon-way. That the plaintiff makes use of the framed waggon-way in the slip of land for his own coals. That the defendant Christian could not carry his own coals, along the slip of land in question, so commodiously as he now does, without a framed waggon-way. That after the making of the indenture in 1755, which was one of the deeds set forth in the case, and before the laving of any framed waggon-way in the slip of land in question, certain brick arches of the height of eighteen feet, and of the breadth of twenty-four feet, were erected partly on the land of the defendant Christian in Unerigg, partly on the slip of land in question at the South end thereof, and partly upon a piece of land adjoining thereto; and which piece of land was purchased by the father of the defendant Christian for the purpose of erecting such arches thereupon, and in order to lay a framed waggon-way over the same. That a part of such arches stands upon the ground so purchased by the father of the defendant Christian. That such purchase was made, and such arches in part erected upon the said purchased ground, (being parcel of a customary tenement of the manor of Ellenborough) and the whole of such arches were erected with the consent of H. Senhouse, the father of the present plaintiff, who was the lord of the said manor, and also a partner in the Broughton Colliery Company. under the said deed in 1755. That before the erection of the said arches, a waggon-way along the slip of land now in question could not be used with such waggons as are now used to carry coals along the same, without great inconvenience.

That from the year 1781 to the year 1784, all coals got at the Broughton pits by the defendant Christian. who had then become sole lessee of the Broughton colliery, were deposited by him in a steath made on his land in Unerigg for that purpose at the South end of the slip of land in question, the said defendant Christian then not having any steath for that purpose at the North end of the said slip; and such coals were afterwards shifted by him into common carts, and then carried therein, by

the side of the waggon-way along the slip of land in question: but that the defendant Christian, having in the year 1784 purchased a steath adjoining to the North end of the said slip of St. H USE land, has ever since that time carried his Broughton colliery coals in waggons along the framed waggon-way down to the transverse road, and along that road into the Northernmost Grass-That the defendant Christian is in possession of the Northernmost Grasslet, mentioned in the declaration. a little before the time of the obstruction after-mentioned, the defendant Christian had taken down the hedge of the close of the Northernmost Grasslet, and had opened a way leading in a transperse direction from the line of the former framed waggon-way along a new framed waggon-way made by him, and laid in the said slip of land, and extending from and out of the said slip of land in the Northernmost close, called the Grasslet, over the place where the hedge had been before standing. That the obstruction, in the defendant's pleas mentioned, consisted in the erection of certain posts and rails placed in the slip of land across the said new transverse waggon-way, and by the side of the former waggon-way, close to where the hedge of the defendant Christian's Northernmost Grasslet on the West side of the slip of land had stood before the new transverse road in question was made. That the space between the rail of the waggon-way, which passes along the slip of land in the straight direction, and the line of the hedge at that part where the supposed obstruction was placed, is one yard and a quarter, and that in various other parts the line of that framed waggon-way goes within a foot of the hedge. That the fence adjoining to the Northernmost Grasslet belongs to, and is repaired by, the occupier of that close. That the plaintiff has transverse roads over the slip of land in question to another close in his own possession, and which transverse roads have been made by the plaintiff since the year 1758; and that the plaintiff leads coals along part of the framed waggon-way in question, and along such transverse roads to and from his closes. That the way granted by the deed of 1722 terminates in an highway leading from Netherhall to Flimby, the soil of which highway belongs to the plaintiff, and in which highway no framed waggon-way has ever been laid, except one made across the same highway, and commencing from the Northern • termination of the framed road along the said slip of land mentioned in the deed of 1722, and which framed waggon-way, so commencing as last aforesaid, leads down to Mary Port, heretofore called the harbour of Ellenfoot, and was made under Dddd Vol. I.

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the above stated agreement of 1755, by the Broughton Colliery Company in the year 1758. That both the framed waggon-way extending in a straight direction along the slip of land, and the other way lying by the side thereof, along the same slip of land, may be passed by carts, carriages, and horses, for ordinary purposes.

The question for the opinion of the court is, whether the

plaintiff is entitled to recover?

Law for the plaintiff observed that two questions arose in this cause: 1st, Whether the deed of 1722, under which alone the defendants justified, explained as it was by other deeds and transactions between the parties, authorised them to fix a framed waggon-way in the slip of land in question, for the purpose of using and enjoying the right of way in that shape. 2dly, Even supposing that the defendants were authorised in laying and continuing a framed waggon-way ulong the slip of land in a straight direction, whether they were also warranted by the same grant to make transverse roads out of the slip of land into other closes adjoining, and not terminated by either of the limits? He first considered both these questions together as they stood under the deed of 1722, unexplained by other circumstances.

The right of way granted by the deed of 1722 does not comprehend a framed waggon-way (a), nor could be intended to do so at the time, inasmuch as it is incompatible with the other species of way granted and reserved by that deed. There is only one way granted for the several purposes of passing on foot, on horseback, and in common carriages. The road should therefore be used and repaired in such a manner us to meet all these uses: but this is inconvenient for all the ordinary purposes of travelling; and indeed there are acts of parliament to prevent these framed waggon-ways from being considered as nusances, where it has been found convenient to carry them across other roads. The right here claimed is also inconsistent with the enjoyment of the pasturage; which is expressly saved and provided for in the deed. The provision also, that, if any gates should be erected, they should be seven feet and half in breadth, is a further proof of the understanding

<sup>(</sup>a) Mr. Law explained a framed waggon-way to be formed, by laying pieces of wood along the road at some depth in the ground on each side, at the distance of the wheels of the carriage, which were joined and kept fast together by bars at equal distances, the interstices being filled up with sand and gravel, so as to render the surface flat. They are now used for carrying the coals from most of the collieries in the North of England.

standing of the parties, that the right granted was to be confined to such a road, to which a gate of that breadth would be a convenient outlet. But since the framed waggon-way has 8ex House been laid by the side of the other, the two together necessarily exceed that breadth. It is a rule of law in the construction CHRISTIAN. of deeds that the intention of the parties should govern. Plow. 160, 1. Shep. Touch. 86, 7. And as to the maxim, that the words of a grant are to be taken most strongly against a grantor, it does not apply here; for this is an indenture, which is the deed of both. Here is a liberty granted to the defendant to make and lay causeways; that license therefore ought to be understood of such ways as were in use at the time of the grant, for such only could the parties intend. But framed waggon-ways were not then in use.

Next, as to the right of the defendant to make a transverse. This is a grant of a road between certain limits; in which case the grantee can only use it in such a manner, as to go from one of these limits to the other. 1 Ro. Abr. 391. A. 1. Laughton v. Ward, Lutw. 111. 1 Ld. Raym. 75. the deed of 1722 the words " when, whither, as often, " and in what manner the grantee pleased," are restrained by the antecedent words, "in, through, over, and along the said way," described by its limits; and the word across is not used. But supposing the questions to be even doubtful on the deed of 1722 alone, still the subsequent deeds and transactions of the parties exclude any idea that the defendant's ancestor was entitled under that deed to either of the rights of way in the manner claimed; or that they could be within the contemplation of the parties. The case states that the lease of the pasturage of the slip of land to Collin, which was made fifteen years after the grant in 1722, was prepared, written, and attested, by the defendant's ancestor. This shews clearly the understanding of the parties to have been, that one road only was to be granted; otherwise if the grantee could have made a framed waggon-way along the side of the road, or transverse roads across the slip of land, it would have destroyed the right of pasturage altogether.

Chambre, contra, was desired by the court to confine himself to the question upon the right of the transverse way.

The single question is on the construction of the deed of 1722 alone. Under that deed the defendant is entitled to a transverse way; for the right of way granted by that deed is coextensive with the slip of land. The words of the grant are to

against CHRISTIAN

be taken most strongly against the granting party, as well in an indenture, as in the case of a deed poll. The deed es SE HOUSE pressly states the uses for which the road was granted, amongst others, that of carrying coals. It is manifest that the granter meant to give the whole extent of the land, for there is no other limitation of the right, intended to be granted, mentioned in the deed, than the breadth of the slip of land. The deed too contains a covenant by the grantee to repair the fences by him newly erected along the side of the way granted; it is not said along the slip of land: which shows that the parties intended that the right granted should extend the whole breadth of the slip of land. So again, in the same deed there is a covenant by the grantor, that he would not plough up the slip of land, whereby the way in, through and along the same

should be straightened.

Then, taking it for granted that the defendant was entitled to a right of way along the slip of land in the manner claimed, there is nothing to prevent him from stopping shore before he gets to the terminum ad quem. The cases which have been cited to the contrary do not apply; they are cases of ways appurtenant to particular closes. But this is a way in gross; for it would be absurd to say, that it is appurtenant to the steps from whence it leads. He admitted, that a way which was appurtenant could only be used in the same manner in which it was granted. But a way in gross is like a highway, leading from vill to vill, in every respect, as to the grantee of the way: it is not necessary to make use of the whole way; he may make an opening into it, and use as much or as little of it as he pleases. The words of the grant are " in, through, and along, &c." but from the terms of it, it may be collected that a greater liberty was intended; for it then proceeds " where, whither, and as often, as he pleased;" the word whither is particularly operative, for it shews that the grantee might go whither he pleased from any part of the road. And the words " leading from the steps to the common high. way," apply only to the slip of land, and not to the use of the way. The antecedent to that description is the slip of land. Law, in reply, was stopped by the court.

ASHHURST, J. As to the direct road, it is most clear that the grantee has a right to the use of it in any manner that is necessary for the purpose of enjoying the privilege intended to be granted. The grant itself says, that " he shall have a " convenient way in, through, over, and along the aforesaid " slip of land, leading from the steps to the common highway, " with full and free liberty to make and lay causeways, &c. and to use and enjoy the same with warns, carts, waggons, or other carriages, and with full and free liberty to carry coals, &c." therefore under this grant the grantee has a 82 HOUSE right to a way from one end to the other for the purpose of Christian carrying coals. And the question is, as to this part of the case, whether under this general grant for the purpose of carrying coals, among other things, he has a right to make any such way as is necessary for the carrying of that commodity. There are no great collieries in the Northern part of the kingdom, where they have not those framed waggon-ways. And the case itself expressly states that the defendant cannot so commodiously enjoy this way in any other manner. Therefore under the original grant he has a right to make a framed wagyon-way along the slip of land in question, which is necessary for the purpose of carrying his coals; it being in the contemplation of the parties at the time of making this grant.

But the principal question is whether, under this grant, the grantee had a right to make transperse roads across the slip of land in question to other collieries purchased subsequently to the time of the grant. As to that, I think the direct way granted does not much differ in its nature from an occupationway: and if a person has a way through a close, in a particular direction, and he afterwards purchases other closes adjoining, he cannot extend the way to those closes. At the time of this grant, it was the intention of the parties that the grantee should have one way from one end of this close to the other; and that way the grantee may apply to what purposes he pleases. But the parties meant that the grantee should have only one way, and that, subject to that, the owner should still have a right to enjoy the pasturage of the slip of land: but that right must be materially abridged by the grantee's making use of more ways than one. The argument in support of the defendant's right, if it has any weight, would go to enable the grantee to make ways to any extent: if he has this right, he could justify making ways all over the slip of land, in case he had purchased other lands adjoining. But it does not follow that, because he purchased the adjoining closes, he can make roads to them across the land in question; for it is inconsistent with the original grant.

Therefore I am of opinion that the plaintiff may maintain his action for the trespass committed out of the way origi-

nally granted.

Buller,

BULLER, J. Two points arise in this case for the consideration of the court. 1st, Whether on the grant of 1722 the against Christian slip of land between the limits mentioned in the grant. Whether he had a right to make another road across the slip of land not leading from one end to the other.

As to the first: It is clear on the face of the grant that he has a right to lay a framed waggon-way along the slip of land: and he has a right to lay it by the side of the common read. It was granted to him, that he should have a free and convenient way for several purposes stated in the deed, amongst others, that of carrying coals; and it is found by the jury, that he cannot so conveniently carry his coals, unless he has a framed waggon-way. Then, if such a way be necessary for the purpose of carrying the defendant's coals, he has a right, accord-

ing to the terms of the grant, to make it.

As to the second point: I think it is equally clear that the defendant is not justified in making roads across the slip of land. It has been contended that this is similar to an highway; but I do not agree with the counsel in that particular. It is true that in ancient proceedings an highway is stated as a road leading from one vill to another; but that is only done for the purpose of shewing that it is an highway. And it has been settled of late years that it is not necessary so to state it in an indictment; for if it be laid to be an highway, that is sufficient. And this case is not similar to that; for here the limits are mentioned as part of the grant. Two parts of the grant have been relied on by the defendant's counsel to shew that these words did not relate to the road, but were only used as a description of the close. First, the word "whither" cannot be understood to mean that the grantee should have a right to go wherever he pleased over the close; such a construction might be more oppressive to one party than beneficial to the other. And as to the description of the limits being applied to the close, and not to the road, that could not have been intended; it would have been absurd to have said, "a close leading from one place to the other;" the word " leading" must relate to the road, and not to the close.

It is to be collected from a subsequent part of the deed, that it was the intention of the parties, that the grantee should not have a transverse road. For after the road was made by him, both were to join in repairing it. That the grantor should

pay

by towards the repairs, could only proceed on the idea of his aving the use of the road. But if the grantee had another ose adjoining to the slip of land half way down, and had Sambouse rried the road to that place, the grantor could not have used at road which only led to the defendant's close. Then if could not use it, there is no reason why he should contriite to repair it. Therefore the parties had in contemplation road extending from the steps to the common highway, hich was to be open to both parties. On a proviso to repair intly, it would be absurd to say that it meant a road which e of the parties could not possibly enjoy. It is manifest at the defendants used this road, not for the purpose of gog from one boundary to the other, but for other purposes; d for that part the plaintiff is entitled to recover.

1787. against.

### PINKNEY against COLLINS.

Friday, 7an. 26th.

IBBS had obtained a rule on a former day to shew cause The venue why the venue in this action, which was for a libel pub-in an action hed in the Salisbury Journal, should not be changed from cannot be indon to Wiltshire. And he observed that the reason, why changed. e court had always refused to change the venue in an action notes or bills of exchange, which was because notes or bills e bona notabilia wherever they happen to be, did not apply the present case; for here the cause of action arose where e paper was printed and published.

Lawrence against the rule said, that this point had already en determined in the case of Hoskins v. Ridgeway (a); tere an application of a similar nature had been made, beuse the paper containing the libel was printed in Lancushire: t the court there refused to grant a rule, giving as a reason, it the paper, though printed in Lancashire, was circulated I sold in other counties.

And The Court, on the authority of that case

Discharged the rule (b).

Postea to the plaintiff.

(a) H. 23 G. 3. B. R.

(b) Post. 647. Post. 3 vol. 306.

1787. Friday, Jan. 26th.

#### PATMAN ogainst VAUGHAN.

per, who sells liquor out of the customers that apply for it, is subject to the bankrupt laws : however inconsiderable the extent of fits arising

An inn-kee- THE plaintiff, who was an inn-keeper, brought this active against the defendant for seizing and taking his good The defendant pleaded the general issue, and proved thatk house to all took the goods as messenger under a commission of bankrup: And the question was, whether the plaintiff was a trader! Upon the trial before Buller, Justice, at the Sittings ale

last term at Westminster, it appeared in evidence, that the plaintiff had kept a public-house for nine months, during which time he had sold to three or four persons about six gallons of spirits altogether. One of the instances was, that having bought five gallons of spirits of one Bennett, he had desired such dealing, him to send two of the five into the country to a person when and the pro- had ordered it of him. It was also said by his own serva: from it, may that if any person had sent for liquor, he might have he The learned Judge left the question to the jury, with this direction; that if they were of opinion that the plaints had endeavoured to make a profit of his trading, and was read to sell to any person who applied to him, and not merely at matter of favor, that then the quantum and extent of the traing were immaterial, and they should find for the defendat-The jury having found for the defendant accordingly;

Erskine now moved for a rule to shew cause why there should not be a new trial, on two grounds; either that this was a direction contrary to law, or that the finding of the jury was contrary to evidence. After observing, that in order to subject i man to the bankrupt laws, it was necessary by the 21 Yec. 1. c. 19. that he should seek his living by trading; and that whe ther the facts found amounted to a trading was a question law (a); he stated the question to be, whether in point of he the proportion of the plaintiff's trading out of the house were sufficient to make him a bankrupt. He admitted that, if the quantum of his trading were in proportion to his usual and procipal business, he was liable to the bankrupt laws, as in the case of Mayo and Archer (b); but he contended that in the present case the quantum of the plaintiff's dealing bore no such propor-That it had always been considered till very lately the the quantum of the trading was material. It was so laid down by Lord Chief Baron Parker in Buscall v. Hogg (c), where the

(a) Cowp. 745,

(b) 1 Stra. 513.

(c) 3 Wils. 146.

instances of trading of one Thickpenny, an inn-keeper, were 1787. much more numerous and stronger than the present; and though the court afterwards set aside the nonsuit in that case, PALMAN wet it was because it did not appear to them what proportion against the trade in his inn bore to his trading abroad and out of doors. And Wilmot, Ch. J. said, "that if Thickpenny's trade and pro-"fits in his inn were much larger than his trade and profits " abroad out of his inn, he should not think him liable to the "bankrupt laws." The distinction seemed to be this; that wherever a man follows one trade only, though his dealing be ever so small, he is liable to the bankrupt laws. But where he has another mode of getting his livelihood, and his trading is only collateral, and bears but a small proportion thereto, in that case the law will not raise a presumption that he seeks to get his living by it. If that were so, either the learned Judge's direction to the jury in this case was wrong, or they have found a verdict not warranted by the evidence.

ASHHURST, J. I do not now consider the question of law to be governed by the quantum of the trading; but I take the rule to be this, that where it is a man's common or ordinary mode of dealing, or where if any stranger, who applies, may be supplied with the commodity in which the other professes to deal, and it is not sold as a favour to any particular person, there the person so selling is subject to the bankrupt laws.

BULLER, J. The case of Bartholomew v. Sherwood (a), was much stronger than the present, On the trial of this cause I Vol. I. E e e e

(a) Barebolomew and Another, Assignces of Davie, against Sherwood, M. 27 Geo. 3. B. R.—This was tried before Mr. Baron Eyre, at the Summer assizes at Oxford, 1786. The plaintiffs, as assignces, brought an action of trover against the defeudant, who claimed under an execution against the goods of the bankrupt.

The only question was, whether Davis, the supposed bankrupt, was a trader within the meaning of the statutes concerning bankrupts. It was contended that he was a dealer in horses; as to which it appeared in evidence, that Davie at this time, and for a few years past, had rented a considerable farm at Whitcourts: and that he kept two, and occasionally three, teams of horses for the farming business. That, previous to his taking this farm, he had lived with an uncle, during which time he attended several different fairs, and occasionally brought and sold horses; that after he took this farm there were several instances of his attending fairs, and of every now and then buying a horse, which was not calculated for the farming business, and which he constantly sold again. It appeared that during the course of two years he had bought and sold five or six horses in this manner, two of which had been sold directly after he had bought them for the sake of a guinea profit, and another was sold again within three days. No evidence being offered to contradict this on the part of the defendant, the Judge left it to the jury on the plaintiff's evidence, and they found a verdict for the plaintiff. A motion was made for a new trial last Michaelmas term, which after argument was refused. And

Ashhurst,

PATHAN
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left the question to the jury with this direction, that if they were of opinion that the plaintiff meant to sell spirits out of his house, and to get a profit by it, the quantity which he sold was immaterial, and he must be considered as a trader. It was proved at the trial, that the plaintiff lived in the publichouse only nine months, during the course of which time there could not be many instances adduced in evidence of his having sold spirits out of the house; but I particularly directed the jury to advert to the circumstance of there not being any one instance of any person, who had applied to buy liquor, having been refused. That is the great point; for as to the extent of the dealing, and the profit which he made, it is immaterial. For if a man make a considerable profit, he is not likely to become a bankrupt; it is only in cases where the profits of the trade are inconsiderable, that such an event is likely to take place. Now the circumstances here were, that from the time when the plaintiff took this house, he was willing to sell spirits to any person who applied; therefore, though the time was short, and the instances of his trading were few, yet I thought it proper to be left to the jury; and they found a verdict for the defendant.

#### Rule refused (b).

ASHEURST, J. said,—It is admitted on the part of the defendant that this was a matter of evidence, and proper for the consideration of the jury. Then if it were proper to be left to them, and there was no evidence to contradict it, they were bound to find as they did. The general principle is right, that a farmer, as such, is not an object of the bankrupt laws; and if a farmer in the course of his business buy a horse, and after using him for some time sell him again, that will not subject him to the bankrupt laws. But in this case the evidence is, that he bought horses for the express purpose of gaining by it.

BULLER, J. It appears upon the evidence that there were many instances of the bankrupt's buying horses which he could not use in his farming business, and others which he bought for the express purpose of selling again. Whether there were more or fewer instances, was proper to be left to the consideration of

the jury.

It is like the case of a vintner, who, if he sell only a few dozen of liquor to particular friends, cannot be made a bankrupt; but if he be desirous to sell to every person who applies, that will subject him to the bankrupt laws. But in all these cases the question is, whether the person buy and sell with a view to make a profit by it; and that is proper to be left to the consideration of the jury. Here it was left to them, and they have found that Davis was a trader.

Rule discharged.

(b) Willet v. Hudson, E. 26 G. 3. B. R. S. P.

# The KING against THOMAS AMERY. Same against JOHN MONK.

Seturday. Fan. 27th:

THE first of these was an information in the nature of a Evidence quo warranto, calling upon the defendant, Thomas Ame-respecting the acceptance of the city of Chester.

The defendant, after having pleaded that the corporation of Chester was a prescriptive corporation, set forth a charter granted in the 37th year of king Charles the Second, by which the citizens and inhabitants of the city of Chester were incorporated. That the charter directed that the corporation should consist (inter alia) of a mayor, recorder, twenty-four aldermen, and forty common council men, &c. and it appointed the first twenty-four aldermen by name. The defendant then averred that the said charter, as to the election of aldermen of the said city, was duly accepted and agreed to by the said citizens and inhabitants; and then deduced a regular title as alderman under that charter.

Replication 1st, That the mayor and citizens, at the time of making the said charter, were not, nor had from time immemorial been, a body corporate, &c.; and issue.

2dly, That king Charles the Second did not grant the char-

ter mentioned in the plea; and issue,

3dly, That the charter 37 Car. 2. as to the election of aldermen was not duly accepted by the citizens and inhabitants; and issue.

4thly, That certain persons in the said charter mentioned did not become nor were aldermen of the said city; and issue.

5thly, That the mayor, aldermen and common council, have not exercised the franchise of electing aldermen according to the intent of the said charter; and issue.

6thly, That the defendant was not, at the time in the plea mentioned, a citizen, and one of the common council; and issue.

7thly, That the defendant was not elected an alderman by the major part of the then mayor, aldermen, and common council, &c.; and issue.

8thly, That the defendant was not duly admitted, &c.; and issue.

The second replication stated, that in the 35th year of the reign of Car. 2. an information was filed in the nature of a quo warranto against the mayor and citizens of Chester; that in Hilary term 35 & 36 Car. 2. there was a judgment by default, by the court of King's Bench, that the liberties, privileges,

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The King against Amert.

and franchises in the said last-mentioned information should be seized into the hands of the king, until the said court there further ordered. That in *Trinity* term 36 Car. 2. it was adjudged by the said court, that the said liberties, &c. should be seized into the hands of the king, and remain in his hands, and that those liberties, &c. should be extinguished, and the said mayor and citizens expelled and removed therefrom; which judgment was in force at the time of making the charter of Car. 2.

It then alleged that there were other matters in the charter of Car. 2. and particularly that the king willed that the charter should be sealed, as well under the Great Seal of England as under the seal of his county Palatine of Chester (a), which were not stated in the defendant's plea; and that the charter, not being accepted by the said citizens and inhabitants as to those as well as all other matters therein contained, was void.

The third replication stated, that Car. 2. by his said charter reserved full power to himself, his heirs and successors, at his and their free will and pleasure, to remove the mayor, recorder, common clerk, or any one or more of the aldermen, common council-men, &c. of the said city, by an order of privy council to them respectively signified; and that as often as he, his heirs and successors, by any such order made, should declare any such mayor, &c. to be amoved from his or their respective offices, that then and from thenceforth the mayor, &c. and all or any of them, so amoved from their respective offices, should without further process actually be amoved, &c. and that in every such case some other fit person or persons, within a convenient time after any such amotion, should be chosen, &c. in such manner as by the letters patent was before directed, into the place and office, &c. of any person so amoved. That king James II. by an order of privy council, dated the 12th of August 1688, according to that power, amoved all the corporators then in being, which was regularly signified to them; wherefore the power in the said charter, as to the election of aldermen, ceased and determined.

The fourth replication stated a charter of the 21 Hen. 7. which was accepted, and a confirmation of it in the 16 Eliz. which was also accepted; that both those charters were in force at the time of the judgments in quo warranto; and that those judgments were in force on the 17th October 1688. That king James II. afterwards, on the 26th October 1688, granted a charter of restoration to the mayor and citizens of Chester,

<sup>(</sup>a) The king died on the 6th of Fobrusry 1684, two days after granting this charter. Vid. Post. 578.

which was accepted: Wherefore the charter of the 37 Car. 2. after the granting and acceptance of the charter of restoration, was of no further effect.

The King sgainst Amery,

The fifth replication stated a charter of incorporation in the 21 Hen. 7. with a power of electing aldermen annually by the corporation at large, which was accepted; a confirmation of it in the 16th Eliz. which was also accepted; and that both those charters were in force at the time when the charter 37 Car. 2. was granted; wherefore it was of no force as to the election of aldermen.

Rejoinder, that the charter of 37 Car. 2. was accepted by the citizens and inhabitants as to all the matters contained therein; and 9th issue thereon. That the order in council was not signified as stated in the replication; and 10th issue thereon. That the charter of 37 Car. 2. continued in full force as to the election of aldermen from the time of the granting and acceptance thereof until the time of exhibiting the information; traversing the acceptance of the charter of James 11.; 11th issue thereon.

That after the granting of the charters of Hen. 7. and Eliz. there were judgments of ouster against the mayor and citizens in the 35 Car. 2. &c.; traversing the charters of Henry 7th, and Eliz. being in force at the time of the charter of Car. 2. and now: 12th issue thereon.

This cause was tried at the last assizes for Salop, before Eyre, Baron, when the jury found a verdict for the prosecutor, on the 3d, 5th, 9th, 10th, 11th, and 12th issues; and for the defendant on the 1st, 2d, 4th, 6th, 7th, and 8th issues.

The pleadings in the other cause of the King against Monk were similar to these, excepting that they were relative to the office of common council-man.

On a motion for a new trial, a very considerable body of evidence was read from the report of the learned judge, a detail of which it is not thought necessary to enter into here; the report of this case being given only for the purpose of shewing the different points of law, which arose in it.

In general it appeared that the select body named in the charter of Car. 2. assumed their corporate functions, and acted under that charter for about three years, during which time about thirteen of the old freemen were admitted under the new charter. That upon the order of council of James II. the old corporation resumed their functions, and the members of the other retired.

The

The King against AMERY.

The restored corporation returned to their ancient mode of proceeding in most articles; but in some instances, and particularly in the election of aldermen and common council, they had in general continued to proceed according to the method directed by the charter of Car. 2, excepting during four years soon after the Revolution; during which time they proceeded nearly, though not entirely, according to the charter of Hen. 7. They likewise continued to hold the hospital lands, and a fair, to which it did not appear that they had any title, but under the charter of Car. 2. It also appeared that the election of aldermen by the select body had been made previous to the charter of Car. 2. by virtue of a bye-law under the charter of Hen. 7. It is also to be rémarked, that the charter of Charles the Second did not appear to have the seal of the county Palatine, according to the directions of the charter; and evidence was given to shew that there was no entry in the seal-keeper's books of the county Palatine, of any fees having been paid for affixing the county Palatine seal (a). The learned judge, after stating particularly all the evidence

to the jury, he had told them that the right of election of addermen in this corporation, in the mode contended for on the part of the defendant, ought to be supported if possible. That the usage had prevailed in Chester for a great number of years, and was reasonable in itself. But that, on a general view of the case in evidence, he found it extremely difficult to support it under the charter of Charles 2. the granting of which appeared to have been a measure of the times, and which, from the moment when it became necessary to tread back those steps in the latter end of the reign of king James, seem to have been entirely laid aside. That in summing up the evidence he had assumed that there was no contrariety. That the jury might conclude upon it, that the corporation of Chester was a corporation by prescription, and un-

concluded his report with observing, that, in his directions

Charles 2. was acted upon for three years next after the granting of it. That, after the charter of restitution was granted, the officers of the old corporation resumed their places; and that from that time they went on without appearing to advert in any one instance to the charter of Charles 2d,

der charters, at the time of the judgment in quo warrante; in which however he stated, that he had differed from the

were in fact suspended by that judgment. That the charter of

counsel on both sides.

(a) Ante, 576.

That the franchises of the corporation

as the authority under which they were to act. For though it was true that one of the witnesses had stated in his evidence, that, as he understood it, the select body was now somewhat The King differently constituted from what it appeared to have been before the charter of Charles 2d, in respect of the two sheriffs making or not making a part of the forty common councilmen; and the elections of mayor, and recorder, are now approved of by the King, which is conformable to the charter of Charles 2d, and is not required by the charter of Hen. 7th; that those, and a few other instances which might occur of apparent conformity to the charter having obtained, without any actual reference to it; and in a multitude of other instances, the usage being in direct contradiction to the charter, he had thought there was in effect no evidence that the old corporation had ever recognized that charter. As to the election of aldermen, it was clear that the usage had existed a great number of years before the charter of Charles 2d.

That the operation of law upon this state of the fact applicable to the issues of this cause was the next thing to be considered. That he went into the discussion of that question with a considerable degree of hesitation in his own mind. That he was not perfectly satisfied as to the legal effects of the judgment in quo warranto; or of charter of restitution: especially as opposed to the charter of Charles 2d, which had That he had hazarded this opinion; that the judgment in quo warranto, being a judgment by default, where no cause of forfeiture appeared upon the record, did not dis-That it only seized the franchise into solve the corporation. the king's hands, and thereby suspended the exercise of the functions of the corporation. That the charter of James the 2d restored the franchise to the old corporators; and that, after that restoration, the charter of Charles the 2d was to be considered in the same manner as if it had been granted before the judgment in quo warranto; in which case, without an acceptance by the old corporation, it would have no effect within the district wherein the old corporation had power to act: And that there was no such acceptance; which was substantially determining the issue upon the acceptance of this charter against the defendant.

Seeing the case in that light, he had treated the issue upon the notification of the order of amotion as of no great consequence in the cause; but, however, that he had directed the jury that there was evidence of the notification proper to be submitted to them.

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The learned Judge then stated that it had since occurred to in him that the question upon the notification of the order of The King amotion might become very material in some events, namely, if it should be finally resolved that the charter of James the 2d did not operate to restore the old corporation; or that the restitution of the old corporation did not dissolve or displace the new corporation under the charter of Charles the 2d. If the old corporation was never restored, and the new corporation, in consequence of the order of amotion, was deprived of all its officers, and consequently could hold no legal assembly. or use any means to perpetuate itself, (and in point of fact that corporation never did assemble again,) it seemed as if there was no lawful corporation in Chester at this day. Or if the old corporation was well restored, but the restoring to them their franchise of being a corporation did not operate to displace or dissolve the new corporation, it should seem as if there would be two bodies corporate existing in Chester at the same time; but, in consequence of the order of amotion, one effectually disabled to act, and now probably dissolved by the natural death of its members, the other active and perpetuating itself in the regular course. And in that case the question now depending would be a question touching the election of an alderman of the old corporation; in which case it seemed to be impossible to maintain the election under the charter of Charles the 2d, it being in his judgment most clear that the old corporation did not accept that charter.

That at the trial the counsel for the defendant had insisted that the judgment in quo warranto had dissolved the corporation; and that the charter of Charles the 2d created a new corporation. That the charter of James the 2d could not restore the corporation which had been dissolved, but might be accepted by the new corporation, and might enlarge the powers of that new corporation. And that the question in the third issue was touching the acceptance of the charter of Charles the 2d by the citizens at large, and not by the old corporation. But he stated that it had since occurred to him, that it was a question which might deserve consideration, whether, upon the issues joined upon these pleadings, it was open to the counsel for the defendant to put the case in that manner; the plea stating in effect, that at the time of granting the charter of Charles the 2d, there was a corporation by prescription exist. ing in Chester, which seemed to confine the question of acceptance in the third issue to an acceptance by that prescrip-

tive corporation.

The

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The Court here observed, that if all the points of law, which might arise in this case, were to be gone into, they were of too much importance to be decided when the Bench was not The Kind And they recommended it to the counsel to confine themselves in their arguments to the third, fifth, and ninth issues, on the acceptance of the charter of Charles the Second: because if it should turn out either to be a verdict against evidence, or that the question was not properly left to the jury, as to those issues, to exercise their judgment upon, that would be a sufficient ground for a new trial, and the questions of law would be open hereafter.

Adair, Serjeant, Wood, Milles, Lane and Topping, against the rule argued very fully on the verdict on those issues, as it was warranted by the evidence alone; in the course of which

two questions were made.

1st. That the charter of Churles the second was not accepted in point of law; because an acceptance of a charter must be by a majority of those persons to whom it is granted, it appears on this charter itself, that it was granted to the citizens and inhabitants of Chester. And the question is, who are meant by citizens as contradistinguished from inhabitants. It could only mean those persons who had been incorporated before the judgment of ouster in the quo warranto information, and who were the ancient freemen of the city. According to Bagge's case (c), a charter must be accepted by a majority of the persons to whom it is directed; for the acceptance by a few will not bind the rest. So if a part of a corporation apply for new privileges, it will not bind the rest unless they consent. The inhabitants of a town cannot be incorporated without the consent of a major part of them (b), and without their consent the charter of incorporation is void. In the King against Askew and others (c), Mr. J. Yates said, the crown cannot compel persons to become corporators against their assent, and that consent can only be testified by their being admitted. But in this case there was no evidence which tended to shew that this charter had been accepted by a majority of the old freemen, thirteen only of whom were admitted; and the proof of that issue was on the defendant. This partial acceptance therefore could not operate. But it was contended at the trial, that the charter was at all events accepted as to the election of aldermen: now that argument Ffff Vol. I. cannot

(a) 1 Rol. Rep. 226. (b) 2 Brown. 100. (c) 4 Burr. 2200.

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cannot be supported, if (as was also contended) the judgment of ouster entirely dissolved the whole corporation. For then The Nica it would be a grant of franchises to a new body of men, who could not in point of law accept the charter in part only. Then, according to the defendant's argument, this charter must be considered to have been accepted in toto, or not at all. And if the jury were not warranted by the evidence to find a verdict for the defendant on the ninth issue in point of fact. they could not find for him on the third point of law: and if any part of the charter was not accepted, the ninth issue must fall to the ground; for that is that it was accepted in all The opinion of the court in the case of the King v. Johnston (a) is extremely strong to shew that the charter of Charles the Second was never accepted.

> 2dly, But even if the court should be of opinion with the defendant on the acceptance, yet the charter itself is void on two grounds; in which case it would be nugatory to grant a new trial upon the question of acceptance of a charter, which if accepted is void. 1st, A charter granted in a county Palatime must have the county Palatine seal. The county Palatine was united with the crown in the reign of Edward the First. And in Selden (b) it is said " that the laws and rightful usages " of a county Palatine are to be preserved." It was by king Charles as Earl of Chester, and not as King of England, that this corporation was created. Many cases have adjudged. that when a seal is necessary to the validity of a grant within a county Palatine, it must be under the seal of the county Palatine. Moor, 874. Lutw. 1232. A presentation to a living within the county Palatine may be good without the seal of the county Palatine: and the reason of that is, because it may pass by parol. But a grant of the next avoidance is void for want of a county Palatine seal. 2 Rol. Abr. 182. D. 1. 2. 1 Brownl. 182. It is sufficient in prescribing for a franchise to say, that it is within his county Palatine, which has jura regulia, and by reason of that he claims such franchises; of which one is to create corporations. 2 Bulst. 267. swer to an observation from the court, that the chief justice. and attorney general, of Chester, were appointed under the great seal; it was said that by the stat. 27 H. 8. c. 24. s. 5. justices of assize, &c. within the county Palatine of Lancaster. were to be appointed under the king's usual seal of Lancaster. in manner and form us hath been accustomed. And it appeared

> > (a) Ante, 367.

(b) Part 2. c. 5. p. 530.

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by the 18th section of that act, that Sir H. Englefield had been appointed justice of Chester and Flint by letters patent under the seal of the county Palatine. And that the appointment of The King the chief justice of Chester under the great seal of England was by virtue of the stat. 34th and 35th H. 8. c. 26. s. 10. That as to the attorney-general, he was appointed under the great seal, because he acted as well without the county Palatine as within it. And 2dly, This charter is void on account of the general power of amotion reserved to the king. It is a condition which the law will not endure; the consequences of which would give the king a power which the law has expressly denied him. Palm. 501 Sir W. Jones, 168. grant by the king to a subject, which is against law, is void. 2 Ro. Abr. 164. 2 Inst. 533. 1 hep. 43. b. 5 Rep. 55. b. And though where to a grant by one subject to another a condition is annexed, which is either impossible or illegal, the condition only is void; yet in the case of a grant by the king, the whole grant is void. 2 And. 156. 2 Freem. 17.

Bearcroft in support of the rule observed, that the third, fifth, and ninth issues altogether formed a question of fact only. And as the learned judge had mis-directed the jury, in telling them the question was, whether the charter of Charles the Second was accepted by the old corporation, instead of the citizens and inhabitants, the defendant was entitled to a new trial. The question left to the jury was not the true one; for the issue joined was on the acceptance by the citizens and inhabitants to whom it was directed and not by the old corporation, who (the defendant contended at the trial) had no legal existence after the judgment of ouster. The old corporation were not known by the name of the citizens and inhabitants. Those terms were descriptive of the persons to whom the charter of Charles the Second was directed. The word "citizens" does not mean "freemen," as freemen of the old corporation; for they were extinct at that time: but the expression may be accounted for in this way; there had been a city, and a corporation; in common parlance the inhabitants were known by the name of the citizens of Chester: the word "inhabitants" was added for the purpose of preventing any mistake; and they are used as convertible terms. The acceptance of a charter in this case was a pure simple question of fact, without any mixture of law. And this has been confounded in the argument by the counsel against the rule, with the case of a charter granted to an exAMERY.

isting corporation. He admitted that it would be a question ot law, whether a part of an existing corporation might or The King might not have accepted a charter, or whether they could partially accept or not. But this being a charter to a new corporation, there was sufficient evidence given at the trial to be left to the jury to determine as to the acceptance of it in fact. Bower, Leicester, Plumer, and Manley, were to have argued on the same side; but they were stopped by the Court.

ASHHURST, J. The only questions for our present consideration are, whether the jury have done right in finding their verdict as they have done against the acceptance of the charter of Charles the Second? and whether the judge, who tried the cause, was or was not correct in his manner of summing up to

the jury?

As to the manner in which the question was left to the jury upon this part of the case, I am of opinion that the judge was in some degree mistaken; for he has stated to us pointedly, that he told them that he thought there was in fact no evidence that the old corporation had accepted the charter of Charles the Second. In a matter of such consequence, I should have thought that, if it were only a question of fact, at all events there was evidence on this point sufficient to be left openly and fully to the consideration of the jury, without any such strong directions as were given. In the first place, I think the learned Judge was mistaken in telling the jury, that the question was, whether the charter of Charles the Second was accepted by the old corporation or not. That was not the issue upon the pleadings; for the words of the issue are, "that " the letters patent ere not duly accepted and agreed to by "the citizens and inhabitants of the city of Chester;" which could not mean the old corporation. For it could only be accepted by the persons to whom it was directed at the time it was made: but the old corporation did not exist at that time; for they were dissolved by the judgment in the que warranto. They no longer existed as a body. If they were not dissolved the question might have been different; therefore, in reason, the only question could be, whether this char. ter was accepted by the persons to whom it was addressed who were the citizens and inhabitants? Now this question was not left to the jury at all, the only question having been, whe. ther the charter was accepted by the old corporation?

Now with regard to the facts which were laid before the jury in proof of the issue, respecting the acceptance by the new corporation, there were many instances; indeed the Judgehimself

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self says, that the evidence was all one way during three years. Several instances are stated of acts done by the new corporation, which could only have been done under the charter of The King Charles the Second; [which Mr. J. Ashhurst here enumerated.] These were such a degree of evidence as should have been left to the jury; and it does seem to me that the evidence was all on one side during that period. The evidence of those acts should at any rate have been left to the jury. whatever verdict they might ultimately have given. And if they had been of opinion that the charter had been accepted and acted under during those three years, that would have been conclusive. For the charter once accepted and acted under for three years was accepted as much as it could be. and must ever afterwards be taken to have been accepted: and the corporation could not afterwards determine upon keeping those franchises which were beneficial to them, and rejecting others which were not so. At all events this evidence should have been left to the jury. And I agree with the learned Judge in the opinion which he has delivered, that courts and juries ought to lean in favour of ancient usages, especially if they tend to preserve the peace and quiet of corporations.

As to the questions of law which may arise in this case, they are matters of future consideration; therefore I shall not enter into them at present. And as they are of great importance, the decision ought to be satisfactory to all the

parties.

As this is a question on which the existence of the corporation depends, and as the ninth issue is thought the most ma-

terial, I am of opinion that it should be tried again.

This is an information in the nature of a que warranto against the defendant, to shew by what authority he claims to be an alderman of Chester. The defendant, in answer to this information, has stated a charter of the 37th of Charles the Second, which he says was granted, not to the mayor and citizens, who were the old corporation, but to the citizens and inhabitants, and accepted by them; he has then derived his title under it. On this plea three issues have been taken, 1st, That the charter was not granted. 2dly. That it never was accepted by the citizens and inhabitants. 3dly, That in this charter there was a clause which enabled the king and his successors, by an order of privy council, to put an end to this corporation by a power of amoving them without assigning any cause; and that king James the Second made such an order, which was notified to the corporation. On these three issues the event of the cause must finally depend.

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1787. pend. The others might have been dispensed with. Though L have stated those three issues, they are more than are ne-The King cessary in order to dispose of the question now before us.

againet Ameny.

For as to the objection, which was taken by one of the counsel against the rule, that the charter of Charles the Second was void because it had not the seal of the county Palatine of Chester affixed to it, there is no foundation for it. The cases which are cited, do not apply; for they are cases of grants within the county Palatine of Lancaster. And it is observable that, even in one of those cases cited, it was held by Lord C. J. Treby, that a corporation made within the duchy, and not in the county Palatine, is without warrant (a). But he said within the county Palatine the king may create a corporation under the duchy seal, because the duke of Lancaster had jura regalia. But it does not follow that, because the king may create a corporation within the county Palatine under the duchy seal, he cannot do so under the great seal. Besides, cases which arise within the county Palatine of Lancaster are not applicable to the present. They depend on a particular statute (b), which is confined to the county Palatine of Lancaster. With respect to offices granted under the great seal of England to be exercised in Chester, it is said that they depend on the statute 34th and 35th Hen. 8. c. 26. which (as it was contended) enacts that offices in Chester shall be granted under the great seal of England, and the chief justice is particularly mentioned. But on adverting to that statute, the argument does not appear to be well grounded; because that act relates only to Wales, and not to Chester. Besides, before the passing of that statute, the crown had used to grant offices in Wales under the great seal; for there is a clause (c) in that statute which says, that commissions under the great seal already granted shall be in force. Another circumstance, worthy of observation, is, that the sheriffs of Chester are appointed at Westminster in the same manner as the other sheriffs in Eng-It is also to be remarked, that the charters of Charles the Second, and James the Second, are neither of them under the seal of the county Palatine of Chester; but they are both under the great seal alone. However, this is not the point now before the court, which is only as to the acceptance of the charter of Charles the Second.

And as to that, it is material, first to consider to whom that charter was granted; and secondly, by whom it is said to have been accepted. I think there was a mistake at the trial by the Judge,

(a) Lut. 1237.

(b) 1 Ed. 4.

(c) S. 11.



sudge, in leaving the question to the jury, whether the old corporation had accepted this charter? Nothing is more clear than that the crown, at the time of granting this charter, con- The KING sidered the old corporation of Chester as totally annihilated and extinguished. It was not granted to them as to a corporation then in existence. And with regard to the term "citizens," the counsel in support of the rule has given the true answer to that observation. Then the question is, whether the citizens and inhabitants had accepted the charter of Charles the Second, or not? I feel less difficulty in differing from the learned Judge who tried the cause, because he has stated to the court that he himself entertained considerable doubts at the time, and that he hazarded an opinion that the judgment by default in the quo warranto did not dissolve the corporation, but that it only seised the franchises into the king's hands, and thereby suspended the exercise of the functions of the corporation; and on that ground considered the question as being, whether the old corporation accepted the charter, or not?

against

As to the facts of the acceptance stated to have been proved, there is such a body of evidence during the course of three years, as in my opinion leaves the question without a And if the corporation accepted the charter only for an hour, that is conclusive for ever; it cannot afterwards be said that they had not accepted.

[Here Mr. J. Buller commented very fully upon every part of the evidence, from whence he took occasion to observe, that there was sufficient evidence to have been left to the jury as to the acceptance of the charter of Churles the Second by

the citizens and inhabitants of Chester.]

I agree with the learned Judge that the election of the defendant should be supported, if it can be so. If on the evidence there is no ground for saying, that the charter was accepted, it will be impossible to support it. But all the evidence goes to shew an acceptance; and there was no contra-

Another objection has been made, that it does not appear that the charter was accepted by a majority of those named in it. I am by no means satisfied that it was necessary that it should be accepted by a majority of them. I hold that there is a great difference between a charter granted in general terms to incorporate the inhabitants of a city, and a charter like the present, which creates distinct parts of the corporate body, fills up some of the offices by name, and leaves it open to them to elect a number of freemen. What is said by Mr. I. Yates.

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I. Tates, in the case cited from Burrow, exactly agrees with what I have just laid down. That was the case of the college The King of physicians. In the charter granted to them, six persons of name, and all others of the Faculty of and in the city of London, are made a body corporate: but the court held that all the practising physicians in London were not by virtue of this charter, members of the corporation. Lord Mansfield said, that the corporation were only bound to admit every person whom they on examination thought fit to be admitted: and that any person who came within that description had a right to be admitted. Yates J. said (a), "I am far from thinking "that all the men of and in London, then practising physic, " were incorporated by the charter. The immediate grantees " under the charter were the six persons particularly named in "it. The rest were to be admitted by them. They were not ited " facto made members. They were first to give their consent, " before they became members: they could not be incorpora-"ted without their consent." Now that charter seems applicable to the present case. For the king by this charter appointed a certain number of aldermen, and a certain number of common council-men. These then, according to the language of Mr. J. Tates, are the immediate grantees of the crown; and a power is afterwards given to them to swear freemen upon their request, they first taking the oaths. Therefore it appears to me, that these freemen stand in the same light in which those persons do who practise physic in London. The corporation have a power delegated to them to swear in certain persons on their doing particular acts. But if the law were not so; if any number of freemen had accepted, it would have been sufficient; for the freemen are an indefinite body. And, in a corporation consisting of different integral parts, if any of the freemen, being an indefinite body. attend the meetings of the corporation, it is sufficient. It is not required in all cases that a majority of the whole body should be present. And if a smaller number than a majority of an indefinite part of the corporation be sufficient to constitute a lawful assembly for doing corporate acts, afser they are incorporated, it will be difficult to find a reason why the same number may not accept the charter. Whether after hearing the opinion of the court on these points. the parties may choose to go to trial again in this case, is for

(a) 4 Burs 2199.

their consideration. But if the cause should be tried again, these pleadings are so defective, that I recommend it to both

parties that they should be amended.

To begin with the plea: it sets out with stating, "that the " mayor and citizens of Chester have from time immemorial, " and by divers charters and grants of divers Kings and "Queens of England, been a body corporate and politic, in " deed and in fact." It is impossible to suggest any reason why this averment was made; it was likely to have the effect which it produced at the trial, of embarrassing the cause, and raising the doubt whether the charter of Charles the Second should or should not be considered to have been granted to a corporation then in being. It is true that the plea has not actually stated that they were a corporation at the time when the charter of Charles the Second was granted: but this allegation is altogether unnecessary. The defendant's case is, that this was an original charter of incorporation; and therefore it was immaterial for him to state a prior corporation. The defendant has then stated the charter in the proper way, "that it was accepted by the citizens and inhabitants." But this is followed by another averment, which is quite new, and which is the foundation of another issue, namely, "that the 46 mayor, aldermen, and common councilmen, or the greater 46 part of them, did exercise the liberty, privilege, and fran-4 chise, of making electing and choosing of aldermen of the 44 said city, according to the direction of the said charter." Now this is perfectly nugatory and unnecessary; for if the charter were accepted, they were bound to act under it; this court would have compelled them to act under it. But the plea, in speaking of the manner in which it was accepted, only says that the charter, as to the election of aldermen, was duly accepted. It is impossible to support this issue in any way. The averment proceeds on a mistake, by supposing that a charter may be accepted in part, and rejected as to the rest. The only instance in which I have ever heard it contended that a charter could be accepted in part only is, where the king has granted two distinct things, both for the benefit of the grantees: there, I know that some have thought that the grantees may take one and reject the other. However that may be, it cannot extend to this case. This corporation must either have accepted in toto, or not at all; if they could have accepted a part only of the charter, they would have been a corporation created by themselves, and not by the king. If a charter directed that the corporation should consist of a mayor, aldermen, and twenty four common council. Gggg Vol. I.

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men, they could not accept the charter for the mayor and aldermen only, omitting the common councilmen. It is m-The King possible to support this part of the plea; therefore this all gation confining the acceptance of the charter as to the aldermen only, ought to be amended. In the replication, the prosecutor has taken the issue on the first averment larger than the plea; for it says, "that the said mayor and citizens, at the time of " the making of the said letters patent in the said plea mentioned, "were not, nor have from time immemorial, been a body " corporate, &c.; neither can this be supported. There are three other replications; one of which introduces the order of privy council for amoving the corporation. I read that part of the charter in a different sense from that in which it is understood by the counsel on either side; for the charter states that the king reserves to himself "a power by any order of "him, his heirs or successors, in privy council made, under " seal to them respectively signified, to amove them, or any of "them." But in looking farther into the charter it appears to me, that that clause does not warrant a general amoval of the whole corporation. It only means, that the king intended, and has by the words of the charter reserved to himself. the power of amoving one or more of the individuals of the corporation who misbehaved, and not of destroying the corporation itself; for it afterwards directs that in case of such amoval the remainder of the corporation should elect others in their room in the manner directed by the charter. If that be the true construction of the charter, one of the replications is entirely out of the question.

With respect to the other replication; it is idle on this record to state what was the ancient constitution of the corporation before the judgment of ouster in the quo warranto; because the defendant has by his plea put his election upon the charter of Charles the Second; he must stand or fall by that; and therefore it was nugatory to state the charter of Henry the Seventh, or any other charter granted to this corporation.

I have thrown out these hints, that the parties may take them into their consideration. But if this record goes down to trial again in its present state, and the court should entertain the same opinion that I do now, I do not know any case that can call more for the animadversions or censure of the court.

Rule absolute.

### ROSE against CHRISTFIELD.

1787. Monday, 7an. 29th.

GARROW had moved on a former day to discharge the de-The rule fendant out of the custody of the marshal in this action that a pr fendant out of the custody of the marshal in this action, that a prithe plaintiff not having proceeded to trial or judgment within once super-three terms after the delivery of the declaration. The defend-sedeable alant was arrested in August 1783 by the sheriff of Kent. The ways condeclaration was delivered on the 20th of November. On the tinues so, only holds 3d of February 1784, no plea having been filed, interlocutory so long as he judgment was signed without demand of a plea. On the 26th remains in of February a plea was filed. And the defendant having re-the same cusmoved himself into the King's Bench, and disputing the regu-der the same larity of the judgment, the plaintiff on the 15th of July volun- process. tarily waived the judgment, and gave notice of trial. In the So that if a Michaelmas term following the plaintiff signed judgment, and prisoner on meene process the day after, he charged the defendant in execution. were super-

Palmer shewed cause, and contended that the rule, that sedeable for when a prisoner is once supersedeable he always continues so, any irreguextended only to those cases where the prisoner was in custody cannot take on the same process (a); and that if the defendant were en-advantage titled to be superseded, when he was in custody on mesne of that after process, he had lost that privilege when he was charged in ex-he is charged in ecution. That this was the only possible way of enforcing execution, judgment against a prisoner, that the demand of a plea was if he had unnecessary, except when the defendant was in court. Rules, any oppor-K. B. 5 W. & M. But even supposing he was entitled to be applying on superseded, he ought to have applied within a reasonable time that ground to complain of a mere irregularity. before he

BULLER, J. (b) In the case of a prisoner in this court there was must be a demand of a plea. If he is in the custody of the execution. sheriff, no demand is necessary. The question how far a pri-

soner

(a) The London Assurance Company against Perkins.

The defendant, who was a prisoner, moved for a supersedeas on the ground that the plaintiff had not proceeded to trial or judgment within three terms after the declaration was delivered.

Runnington, against the rule, contended that, as the defendant was originally in custody at the suit of the plaintiffs under meene process, and after the judgment

was charged in execution, he could not therefore be di charged.

Gowper for the detendant insisted on the old principle, that, if a prisoner be once supersedeable, he always continues so; and then that the plaintiffs could not be charging the defendant in execution, make that right and regular, which befo e was wrong and improper

Per Curiam. As to the principle laid down it extends only to the same process: and where the nature of the charge is altered, as in the present case to a charge in execution, it is quite otherwise. This point has been repeate to determined. Rule discharged.

(b) Mr. J. ASHHURST was absent this day.

Rose against CHRIST-

soner in custody, who was entitled to be superseded, could be proceed ed against, was gone into in the case of Foy v. Percy (a), in the Common Pleas. There the plaintiff brought an action against the defendant, in which he was nonsuited. The defendant brought an action against the plaintiff, and recovered a verdict; and both the judgments were signed in Trinity term The plaintiff was immediately taken in execution on the judgment of nonsuit; and was entitled, and applied, to be discharged at the last assizes under the Lord's act; but the defendant agreed to pay him his 2s. 4d. per week. In April the defendant failed to pay him his allowance, on which the plaintiff applied to be discharged: but before he had obtained an order for that purpose, the defendant took him in execution on the other judgment. And it was insisted that he should have been charged in execution on the second judgment within two terms after judgment obtained: but it was answered that he never was in custody in that suit, and therefore not within the rule; to which the court agreed. Then it was objected, that he being in custody only on the judgment of nonsuit, and being supersedeable in that, he could not be charged in execution at all; and of this opinion were the whole Court: though they agreed, that if he had been once actually superseded, and out of custody, he might have been taken again on a capias ad satisfaciendum on the the other judgment immediately by the sheriff, or if he had not been supersedeable, the charging him in execution would have been proper. fore he was discharged. But I believe that Court were soon afterwards satisfied, that such a determination was attended with infinite mischief and inconvenience; for the result of it was, that a prisoner, who was supersedeable, but not superseded, could not be proceeded against at all. For if in actual custody, he could not be proceeded against like a person out of custody, and if entitled to be superseded he could not be proceeded against as any other prisoner; and I understand the practice in that court is now otherwise settled (b). rule, that, where a prisoner is once supersedeable he is always so, must be understood with this qualification; that he is only supersedeable so long as he remains in the same custody and under the same process. For the moment the nature of the custody is changed, that rule ceases. Therefore if a prisoner be supersedeable for any irregularity, as for want of a demand of a plea, he cannot take advantage of that after he is charged in execution, supposing he has any opportunity of apply-

(a) C. B. Tr. & G. 3. (b) Vid, Hutchings v. Kenrick, 2 Burr. 1048.

ing on that ground before he is charged in execution. Now here the defendant had ample time; for judgment was signed in Michaelmas term 1784, and he might have applied in the Trinity term following.

Rose against CHRIST-

Rule discharged (a).

(a) Vide Hutchings v. Kenrick, 2 Burr. 1048. Wilkinson v. Jaques, poet. 3 vol. 392.

#### DOE on the Demise of MARY LYDE against ANN LYDE.

Wednesday, Fan. 31et.

THIS was an ejectment for leasehold premises in St. Mary If a term be le Bone, Middlesex, on the demise of Mary Lyde, widow bequeathed laid on the 26th of December 1785, and tried at the last Sit-life, and after tings at Westminster, before Buller, Justice, when the jury his decease found a verdict for the plaintiff, subject to the opinion of the to Margaret Court on a case reserved.

S. Lude, possessed of a term in the premises not yet expired, ter the deby will dated 16th March 1775, gave them to his son G. Lyde, cease of the for life, and after his decease to Margaret his wife for life, survivor to and after the decease of the survivor to the children of George, of G. L. share and share alike; but if George should die without issue of share and his body, then to his son Robert Lyde for life, and after his share alike, decease to Mary his wife, with the like limitations to the chil-and it G. I. dren of Robert, as to those of George; and if Robert should issue of his die without issue then over. On the 12th of May 1778 the body, then testator died. On the 17th May 1778 Margaret died, having to R. L. for had one doughter only by George Lude, who died an infant in life, and afhad one daughter only by George Lyde, who died an infant in ter his dethe lifetime of the testator, and before the date of his will cease to In May 1785 Robert Lyde died without issue, having made Mary his his will and appointed Mary, the lessor of the plaintiff, his ex-wite for life, with ecutrix. On the 22d O tober 1785 George Lyde died without remainders issue, leaving a second wife, the defendant, his executrix and over; the residuary legatee.

The question is, whether the plaintiff is entitled to recover? to Mary is good, in Morgan, for the lessor of the plaintiff, admitted that the case G. L. rule had been laid down in many of the old cases, that the dies withwords of a devise, if they could carry an estate tail of a free-out leaving hold, would give the whole interest in personalty (a): but in R L. dies the latter cases the intention of the testator has been attended during his to; and a devise over of a chattel "after failure of issue," or, life. "dying without issue," has been held good, where it could be

collected

(a) 3 Cb. Cas. 1.

Dog against Lype.

'collected that the testator meant "without issue living at the " time of the death of the devisee." Askinson v. Hutchinson, 3 .P. Wms. 258, 2 Eq. Cas. Abr. 294. Nichols v. Cooper, 1 P. Wms. 198. Keily v. Fowler, 6 Brown's Parl. Cas. 309. And in Bigge v. Bensley (a) the Lord Chancellor said, "was not " the argument in Keily v. Fowler, that the obvious meaning "of the words, 'shall die without issue,' was a general fai-"lure of issue, but controllable by words or circumstances?" Now in this case the general words, " die without issue of his "body," are controlled by those which precede, namely, the children of his son. In Maddox v. Stains (b) where there was a bequest of personalty to A. S. wife of J. S. for life, and after her death the yearly interest was bequeathed to her children by J. S. and for want of such issue, then over, the devise over was held to be good; the words, for want of such issue," being the same as "for want of such children." So that here the limitation is good, because it must take effect (if at all) on the death of George leaving no issue living, and not after an indefinite failure of issue. In the case of Sheffield v. Lord Orrery (c), Lord Hardwicke said, that if a limitation of a chattel be confined within a life or lives in being or within ten months, or the birth of a child after, or in case of the death of such child before twenty-one, or if limited on a contingency to a person who never takes, the limitation over is good. Where there was a bequest of a term in trust for F. L. for life, and to his first and other sons in tail, and in default of such issue to daughters, to be divided between them share and share alike, and in default of daughters, then over to the plaintiff, and F. L. died, never having had a son or daughter, it was adjudged that the limitation over to the plaintiff was good (d). So where there was a bequest of personal estate, &c. to the first son of the testator's daughter, who should attain twenty-one, and if no son should attain that age, to J. S. the limitation over to J. S. was holden good (e). And in all those cases where the court has held a devise over of personalty to be void, the words of the devise were such as would in the case of a freehold have created an express estate-tail, and not such as would have created an estate-tail, by implication only; as in Daw v. Lord Chatham, 6 Br. Parl. Cas. 450.

Wood for the defendant contended that the limitation under which the lessor of the plaintiff claimed was too remote, as being

(a) Brown's Cha. Cas. 188. (d) 2 P. Wms. (18. (b) 2 P. Wms. 421. (e) 3 P. Wms. 306. (c) 3 Atk. 287.

being to take effect after an indefinite failure of issue. If this had been a devise of a freehold, George Lyde would have taken And the rule is, that where a limitation of a an estate tail. freehold will carry an estate tail, in the case of personalty the first devisee takes absolutely. If instead of the word "children," the testator had used the word "issue" of the son of George Lyde, there could have been do doubt but he would have taken an estate tail, as he had no issue then living. King v. Melling, 1 Ventr. 225. 2 Lev. 58. And the subsequent words used by the testator are, " if he shall die without issue of his body, so that it appears that he used the words "chil-"dren" and "issue" as synonymous. The testator meant that all the issue of George Lyde should take, and not that it should be confined to his children only; because, by such a construction, if a child of George Lyde died during the life of the father, leaving a child, such grandchild would be excluded. There is no case in which it has been decided that such general words as the present have been confined to dying without issue at the time of the death. In Lord Beauclerk v. Dormer (a), there was a devise to the defendant, and if he died without issue, then to the plaintiff; and the question being, whether these words "if she die without issue" should be restrained to issue at the time of her death, Lord Hardwicke said, as the words are general and unrestrained, they cannot be confined to the defendant's dying without issue at the time of the death. The same doctrine was held in Saltern v. Saltern, 2 Atk. 376. In Destouches v. Walker (b), there was a bequest to C. Hedges of all the testator's money and stock in the funds; but in case he died without issue, then he willed that all his effects should be equally divided between his nearest relations which should at that time be living; Ld. Northington was of opinion that the limitation over was too remote. And in Bowden v. Lord Galway (c), where there was a bequest of personalty to G. Bowden for life, and if he had no heirs, then to his sister; Lord Chancellor Northington held that the bequest to G. Bowden amounted to a gift of the absolute interest, and that the limitation to the sister was void. The cases of Daw v. Lord Chatham, and the Attorney General v. Herd (d), are to the same effect; and in the latter of those all the cases which have been now cited by the plaintiff were considered.

1787. ~ Don against Lyde.

(a) 2 Ath. 308. (b) Cor. Lord Northington, Mich. 1764.

(c) Cor. Lord Northington, December 1764. (d) Brown's Ch. Cas. 179.

There is no one case in which it has been decided that the

words

Doe againer Lyde.

words "dying without issue" have been restrained to "is "sue living at the death of the devisee," without other words or circumstances. In Forth v. Chapman (a), great stress was laid on the word "leaving." In Keily v. Fowler, there were particular words and circumstances to vary the general construction. But here this is a limitation over after failure of issue indefinitely, without any other words to control them.

ASHHURST, J. It is very true that there has been a variety and contradiction of determinations upon this subject; but the general principle that governs these kind of cases is this; where there is an express limitation of a chattel by words, which, if applied to a freehold would create an express estatetail, the whole interest vests absolutely in the first taker, and a limitation over of such a chattel is too remote to take effect. But where there is no such express legal limitation, the court will consider the intention of the testator. Here, there is no such strict legal limitation; and the intention of the testator is evident. The words are, "I give and bequeath, &c. to my " son George, for life, then to his wife for life, and after the " decease of the survivor of them, then to his children, and in " default of issue, then over;" this is not such a limitation as must in its legal operation constitute an estate tail. Then it is open to us to consider the intention of the testator; and of that there can be no doubt. The plaintiff is entitled to recover.

Buller, J. Nothing in my opinion can raise a doubt in this case, but overwhelming it with a number of cases. For it seems to me, if this will be read in the manner in which it ought to be, and which is the true way as laid down by Lord Ch. J. Wilmot in the case of Keily and Fowler, viz. to read the words of the will with reference to the rules of law, it can-

not admit of any doubt.

Two distinctions have been taken in former cases, which, if they hold, will govern the present. The first is, that in the case of a bequest of a term or chattel, the words "dying" without issue" shall be considered with a double aspect comprising two contingencies; the one, if the person die without leaving issue; the other, if he died leaving issue, which afterwards die without issue. Now unless that rule be explosed, it will decide the present case; the contingency, on which the limitation was to take effect, having happened within the time limited.

The second distinction, which was taken by Lord Macclesfield, is between an express and an implied estate tail, in the case

(a) 1 P. Wms. 663.

of a bequest of a term: whether that distinction has been shaken, or whether it was wise to depart from it after it became a rule, it is unnecessary now to determine. Because in this case, upon the face of the will, the intention is plain, and if the intention of the testator is clear, there is no case in law which says that the intention shall not prevail.

Don against Lypn.

As to the argument, that if this had been a devise of a free-hold the words would have created an estate-tail, and therefore that when applied to personalty, the whole interest vests in the first taker: if the foundation of that argument fail, there is an end of every thing which is built upon it. Now, in my opinion, nothing is so clear as that, if this had been a devise of a freehold, it would not have given an estate-tail. It is to George Lyde, and after his decease to M. his wife for life, and, after the death of the survivor of them to their children share and share alike. But an estate-tail, is to a man and the heirs of his body in succession: that is not the case here, for by the express words all the children are to take equally; and to do that they must take as purchasers.

But this being a bequest of a term, I shall again have recourse to Lord Ch. J. Wilmèt's doctrine in Keily and Fowler, where the words were "heirs of the body, and he there said, "the truth is, we are bound to an artificial and technical sense "of those words, unless there is an apparent intention in the "testator of using them in their natural meaning." And for that purpose, which is in favour of common sense, the most

miling circumstance is sufficient.

that case the words "heirs of the body, though strict twords of limitation, were controlled by very slight cirtances indeed. In this case the circumstances are very 3. The testator has given to the children the interest of interest of interest and share alike, that is for ever; so that we point the limitation over is founded, as the tile remainder over to Robert being for life, and another the limitation must take place (if at all) as a life in being, which entirely excludes the said; failure of issue. In a very full note of the will, v. Fowler, which I have seen, where stress cumstance of the limitation over being to ned in the will, and that the event looked H h h h

1787. Dos against LYDE.

to was likely to be within their life, it was said, " we are not " to consider of legal consequences of legal representations, "but only what the testator meant by giving it to his execu-"tor." In this case it does not require so much reasoning; because the testator has expressly given the estate to R. Lyde for life, in the event of G. Lyde's dying without issue; which shews that the testator looked to the event of G. Lyde's dying without issue at the time of his death.

Postea to the plaintiff.

Wednesday, Fan. 31st.

The KING against The Inhabitants of MELKRIDGE.

n of Sessions for the county of Northumberland, confirming

Where a pau- D ULE obtained by Chambre to shew cause why an order per was per mitted by several pera right of common, to occupy a tenement of 10/. a year, as a reward for his ser-VICE AS & held that ment.

an order of two justices for the removal of Yohn Pattison, sons, having Elizabeth his wife, and their five children, from the township of Simonburn, in the parish of Simonburn, in the county of Northumberland, to the township of Melkridge, in the parish of Haltwhistle, in the same county, should not be quashed. The case stated, that Joseph Pastison, the grandfather of the said John Pattison, acquired a settlement in the township of Melkridge, by renting and residing upon a tenement of the herd, it was yearly value of 10%. That neither the father of the said Yokn Pattison, nor he himself, did any act to obtain a settlement. that gave him a settle- And that the settlement of the said Joseph Pattison the grandtather was the derivative settlement of John Pattison the pauper. And it also appeared that the said Joseph Pattison the grandfather, after his so acquiring a settlement in the township of Melkridge, having then a family, was appointed to be a herd to several persons having a right of common upon a large and extensive common or waste, lying in the township of Henshaw, in the said parish of Haltwhistle. That he accordingly entered upon his said employment, and removed with his family to a house situate upon the said common, where he resided several years, and until his death. as a reward for his said services, he was allowed the exclusive enjoyment of the said house, and of a parcel of meadow ground adjoining thereto, and that such house and ground were worth 20% a year.

Law, in support of the order of Sessions, was proceeding to argue that this case might be distinguished from all the former ones ones on this subject, for that here the pauper had not occupied the tenement as his own, but as a servant of some of the commoners, and who had no power themselves to grant such a The Kino licence; but he desisted from arguing it further, as

The Court thought no doubt could be entertained upon the For they said that the service of the pauper was. equivalent to his paying rent; and that the commoners, instead of giving him so much money by way of wages, had permitted him to occupy this house. That the case had expressly stated that the pauper had the exclusive enjoyment of the premises in question, which were worth 201. a year. That possession could not be stated in stronger terms. that the case of the King v. Fillongley (a) was much stronger.

against The Inhabitailts of MELK-RIDGE.

Both orders quashed.

(a) Ante 488.

### PAUL against JONES.

Thursday, Feb. 1st.

THE defendant being indebted to Hemming and Smith in A surety, 901. prevailed on the plaintiff and two others to join who does not pay the with him, in January 1785, in giving a warrant of attorney to debt of the confess judgment for that sum, with a defeazance thereon, in principal till case the debt was paid by three instalments of 30% each, in after his two, four, and six months. Default was made in payment. though call-In November 1785 the defendant became a bankrupt; and in ed upon and December 1786 obtained his certificate. Before the bankrupt-liable to pur cy, the plaintiff was applied to for payment by Hemming and it before, Smith, but did not pay any part till afterwards, when he paid the principal The defendant, having been held to bail for this sum, to bail, notobtained a rule to shew cause why he should not be discharg-withstanded out of custody on filing common bail, on the ground that ing his certhis debt might have been proved under his commission.

Mingay shewed cause, and insisted that, as the money was not paid before the bankruptcy, the debt could not be proved under the commission, and then the certificate was no bar. Taylor v. Mills and Another. Cowp. 525.

Garrow, in support of the rule, contended that, as default was made in the payment by instalments before the bankruptcy, the debt accrued at that time, and consequently was capable of being proved under the commission. That this case was distinguishable from that of Taylor v. Mills, because here the plaintiff was applied to for payment before the commission; PAUL against Jones.

and therefore he was endeavouring to take advantage of his own neglect. And he compared this to the case of Brooks v. Lloyd (a), where it was held that, as the plaintiff might have proved his debt under the commission of bankrupt which had issued against one of the defendants who was a surety, and had neglected to do so, the certificate operated as a bar.

ASHHURST, J. The rule of law is, that though a party make himself liable for the debt of another by a contract prier to the bankruptcy of such other person, and he does not actually pay that debt till after the commission of bankrupt, he cannot prove his debt under the commission. Here it was not paid till afterwards; and as the debt only accrued by actual payment, there was no debt to which he could swear at

the time of the bankruptcy.

Buller, J. The two leading cases are Goddard v. Vanderheyden (b), and Young and Another v. Hockley (c); where the court held that, inasmuch as the money was not actually paid before the bankruptcy, the debt should not be barred by the bankrupt's certificate. Those two cases have been followed and recognized by many subsequent determinations. Till the money is paid, the party cannot prove his debt under the commission. The case of Brooks and Lloyd does not apply here. The bond in that case came within the statute of 7 G. 1. (d); and it was the same as if it had been given by one defendant alone; for both were principals. But here, as this money was not paid by the plaintiff, who was only a surety, till after the bankruptcy, the defendant is not entitled to be discharged.

Rule discharged.

(a) Ante, 17. (b) 3 Wilson, 262. (c) Wilson, 346. (d) c. 31. .

Saturday Feb. 3d. HOLDFAST on the Demise of WOOLLAMS against CLAPHAM.

The title to copyhold land relates back from the time of the admittance to the surre der as admittance on the 26th of July 1786, on a surrender by the

tance to the admittance on the 26th of July 1786, on a surrender by the against all defendant, persons but

the lord. So that the surrenderee may recover in ejectment against the surrenderor; on a demise laid between the times of surrender and admittance.

lefendant, by way of mortgage made before April 1786; so hat the demise laid was before admittance. Mr. Justice Buler on the trial being inclined to think that the title of a copyloder was not complete (so as to maintain an ejectment) before admittance, the plaintiff was nonsuited. And there was not the last term a motion to set aside the nonsuit. It was argued on the part of the defendant, that a surrenderee cannot naintain trespass till admittance, for which was cited Cro. Eliz. 349. But we think that the doctrine laid down in that case will not govern the present. For trespass is a possessory action, and the case there put is of a surrenderee who never was in possession; so that the determination in that case may be true. But ejectment is a fictitious action for the trial of title.

As against all persons but the lord, the title of the surrenderee, after admittance, is perfect as from the time of the surrender, and shall relate back to it. If there had been no admittance here before the trial, it might have raised a greater doubt; though even then, in the present case we do not think it would have barred the plaintiff's right to recover, for reasons which I shall state hereafter. But here there was an admittance before trial, and that shall by relation operate so as to give the plaintiff a complete title from the time of the surrender: for the admittance is only a circumstance required by law merely for the sake of the lord. In 1 Leon. 100. Rumney v. Eves, it was holden, that if customary land do descend to the younger son by custom, and he enter and leaseth it to another, who takes the profits, and after is ejected, he shall have an ejectione firma, without any admittance of his lessor, or presentment that he is heir; though there it might be as well urged that the lessor's title was a part of his, and not complete without admittance. But if there could have been any doubt as between the present lessor of the plaintiff and a stranger, we think that, considering the relation between the lessor of the plaintiff and the present defendant, that doubt is removed: for this ejectment is brought against the surrenderor himself. by the surrenderee. For the surrenderor is considered as a trustee for the surrenderee. 9 Mod. 75. The case of Davu v. Beardsham is there cited, which was, where the testator had agreed for the purchase of a copyhold, and pursuant to that agreement a surrender was made out of court to his use; then he devised all his lands to R. B. and died before admittance; it was decreed that the copyhold lands should pass; because the testator had a title in equity to recover them, and .i .b.

the vendor stood seized for him till a legal conveyance could be made. If then the surrenderor is only considered in the light of a trustee for the surrenderee, whatever might have been the case formerly, in these days the courts have considered this species of action with greater liberality, and will never suffer a trustee to set up a formal objection against the plaintiff's recovering the possession of that property which he only holds in his right and for his benefit. Therefore on the whole we think that this nonsuit ought to be set aside, and a new trial granted.

Rule absolute (a).

(a) Vide 4 Burr. 1952.

Monday, Feb. 5th.

### TURNER against WINTER.

A patent is woid, if the specification be ambiguous, or give directions which tend to mislead the public.

THIS was an action on the case brought against the defendant for infringing the plaintiff's patent, which was granted to him for producing yellow colour for painting in oil or water, and making white lead, and separating the mineral alkali from common salt, all by one process. On the trial before Buller, J. at the last Sittings at Westminster, a verdice was found for the plaintiff; and on a motion to set aside that verdict and grant a new trial, these facts were reported. The plaintiff within the usual time had enrolled the following specification: " Take any quantity of lead, and calcine it, or mi-" nium, or red lead, litharge, lead ash, or any calz, or prepar-" ation of lead fit for the purpose; to any given quantity of "the above mentioned materials add half the weight of sea " salt, with a sufficient quantity of water to dissolve it, or " rock salt, or sal gem, or fossil salt, or any marine salt, or " salt water proper for the purpose; mix them together by "trituration till the lead becomes impalpable, or sufficiently " comminuted. When the materials have been ground, let "them stand for twenty-four hours, in which time the lead " will be changed to a good white, and the salt decompound-"ed; if not, the trituration must be repeated with a further "addition of salt, till the white colour be obtained; the de-" composition of the salt may also be brought about by diges-"tion or by calcination. The materials may be suffered to re-" main together, before the alkali is separated by the addition " of water, for a longer time than is specified above, accord-" ing to the discretion of the operator, and the end he wishes " to obtain. The yellow colour is produced by calcining the " lead after the alkali has been separated from it till it shall " acquire

TURNER against WINTER.

acquire the colour wanted: This will be of different tints according to the continuance of the calcination, or the degree of heat employed. The white lead must be finished by repeated ablations, and by bleaching it till the white be made perfect." On the part of the plaintiff it was proved hat the first effect of the process was the separating of the mieral alkali from common salt; that that produced white lead; nd that by continuing the process to a certain degree, and aferwards exposing the matter, the yellow colour was produc-That as the specification required the heat to be continud till the colour was obtained, any person trying the experinent would necessarily be led to fusion. That a chymist vould see by the specification, that if less heat would not anwer the purpose, he must go on to fusion. The difference between fusion and calcination, both of which proceed from lifferent degrees of heat operating upon the subject matter, was that the substance to be calcined continued in a solid form: whereas fusion is a liquid state to which the substance may be reduced by continuing the heat. Instances were produced by persons who had made the colour by the help of the specification after trying some experiments. In trying those experiments minium had been fused in the first instance. The white lead produced by following the directions in the specification was not what was sold as such, but a white substance, the basis of which was lead. For the defendant it was proved that the patent colour could not be made by following the directions of the specification. For calcination was not sufficient to produce the effect intended; it was necessary to go on to fusion. That, as it appeared upon the specification, minium or red lead might be considered most convenient for the purpose, because a previous process was necessary to reduce lead to minium or litharge, before the other parts of the process were to be begun; minium and litharge differing only in having undergone different degrees of calcination. But that minium would not produce the effect unless first fused. that if red lead were calcined, the experiment would not succeed without fusion: whereas, according to the terms of the specification, fusion should be cautiously avoided. specification was calculated to mislead also with respect to the salts. For fossil sal is a generic term, including all mineral salts: but only one species of fossil salt, namely, sal gem, has marine acid, without which the colour could not be produced. That several persons had tried to make white lead by the specification, but had not succeeded. They could only produce

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produce a greyish white powder quite unfit for painting, as not merchantable.

Tunner against Winter.

Mr. J. Buller, after reporting these facts, observed, the at the trial three objections had been taken to the specification 1st, That after directing that lead should be calcined, it do rected another ingredient to be taken, which would not an swer the purpose, namely, minjum. Neither was it said that the minium should be c leined or fused: But if it had any reference to the preceding words, then it should be calcined, which would not produce the effect, fusion being necessary. 2dly, That " fossil salt" was improperly mentioned. were many kinds of fossil salt, only one of which, namely, " sal gem," would answer the purpose: because it must be a marine salt. 3dly, That all these things put together did not produce the thing intended. And the patent was for an iavention to do three things in one process, whereas one of them, namely white lead, could not be produced at all; for that a white substance like lead remained, applicable only to some of the purposes of common white lead. The learned Judge then said, that at the trial he had told the jury, that if either of these objections were well founded, it would avoid the patent.

Erskine and Piggot shewed cause against the rule for granting a new trial, and contended that in actions for infringing patents it is not necessary for the plaintiff to give any evidence to shew what the invention is, but that it is incumbent on the defendant, if he objects to the specification, to shew that it is defective, and that persons acquainted with the subject, could not by the assistance of the specification effect the thing intend-The consideration, which the patentee gives for his monopoly, is the benefit which the public are to derive from his invention after his patent is expired: and that benefit is secured to them by means of a specification of the invention. But it is not necessary that that specification should be such, as that persons unacquainted with the terms of art, which must necessarily be used in writing it, should be able to understand It is sufficient if persons of skill can understand the process by means of the specification, so as to keep alive the discovery after the patentee's exclusive title is expired.

The first objection which has been raised against the sufficiency of this specification has no weight; for though the direction to calcine is applicable to all the ingredients in the first part of the description, yet scientific persons would instantly

discover

liscover what degree of heat was necessary to be used to each of those ingredients; and that minium being already a calz. nust be fused. 3dly, The heat is ordered to be continued till he experiment succeeds, and the colour is produced. Fusim is a necessary consequence of continuing the heat; and this lirection would be sufficiently understood by all persons acmainted with the subject.

1787. egainst

As to the 2d objection with respect to the "fossil salt," The apecification begins with " sea salt," which is the genus; hen it afterwards states not "any fossil salt," but "fossil alt," or " any marine salt;" the marine salt is therefore the mais of the experiment. So that no fossil salt but what is ikewise a marine salt can be taken under this description.

The answer to the 3d objection is that a species of white ead is produced, though not the common ceruse; and the paent does not profess to make the common white lead. sides the making of white lead was not the subject of the preent action, which was for making the yellow colour; this accounts for the plaintiff's not being prepared to prove this part of the specification. Upon the whole this was a mere matter of evidence, as to the sufficiency of the specification upon which the jury have exercised a sound discretion.

Bearcroft, in support of the rule, was stopped by the Court. ASHHURST, J. I think that, as every patent is calculated to give a monophy to the patentee, it is so far against the prin. riples of law, and would be a reason against it, were it not for the advantages which the public derive from the communication of the invention after the expiration of the time for which the patent is granted. It is therefore incumbent on the patentee to give a specification of the invention in the tlearest and most unequivocal terms of which the subject is tapable. And if it appear that there is any unnecessary ambiguity affectedly introduced into the specification, or any thing which tends to mislead the public, in that case the patent is roid. Here it does appear to me, that there is at least such a doubt on the evidence, that I cannot say this matter has seen so fully and fairly examined, as to preclude any farther investigation of the subject. Three objections have been made to this specification. The first is, that in the specification the public are directed " to take any quantity of lead. and calcine it, or minium, or red lead;" from whence it is inferred that calcining is only to be applied to lead: I confess if Liii

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1787.

TURNER

against

WINTER.

if the objection had rested here, I should have entertained some doubt.

The next objection is, that in the subsequent materials to be added, the public are directed to add "half the weight of sea "salt, or sal gem, or fossil salt, or any marine salt." Now "fossil salt" is a generic term, including "sal gem" as well as other species of fossil salt. And I understand that sal gem is the only one which can be applied to this purpose; so that throwing in fossil salt can only be calculated to raise doubts and mislead the public. That word could not have been added with any good view; it must produce many unnecessary experiments; therefore in that respect the specification is not so accurate as it ought to have been.

Another objection was taken as to the white lead; to which it was answered that the invention did not profess to make common white lead. But that is no answer; for if the patentee had intended to produce something only like white lead, or answering some of the purposes of common white lead, it should have been so expressed in the specification. But in truth the patent is for making white lead and two other things by one process. Therefore if the process, as directed by the specification, does not produce that which the patent profes-

ses to do, the patent itself is void. It is certainly of consequence that the terms of a specification should express the invention in the clearest and most explicit manner; so that a man of science may be able to produce the thing intended

without the necessity of trying experiments.

BULLER, I. Many cases upon patents have arisen within our memory, most of which have been decided against the patentees, upon the ground of their not having made a full and fair discovery of their inventions. Wherever it appears that the patentee has made a fair disclosure, I have always had a strong bias in his favour, because in that case he is entitled to the protection which the law gives him. How far that law, which authorises the king to grant patents, is politic, it is not for us to determine. When attempts are made to evade a fair patent, I am strongly inclined in favour of the patentee: but where the discovery is not fully made, the court ought to look with a very watchful eye to prevent any imposition on the public. Then the question is whether the present plaistiff has made a fair discovery? I do not agree with the coursel, who have argued against the rule, in saying that it was not necessary for the plaintiff to give any evidence to she

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what the invention was, and that the proof that the specification was improper lay on the defendant; for I hold that a plaintiff must give some evidence to shew what his invention was, unless the other side admit that it has been tried and succeeds. But wherever the patentee brings an action on his patent, if the novelty or effect of the invention be disputed, he must shew in what his invention consists, and that he produced the effect proposed by the patent in the manner specified. Slight evidence of this on his part is sufficient; and it is then incumbent on the defendant to falsify the specification. Now in this case no evidence was offered by the plaintiff to shew that he had ever made use of the several different ingredients mentioned in the specification, as for instance minium, which he had nevertheless inserted in the patent; nor did he give any evidence to shew how the yellow colour was produced. If he could only make it with two or three of the ingredients specified, and he has inserted others which will not answer the purpose, that will avoid the patent. So if he makes the article, for which the patent is granted, with cheaper materials than those which he has enumerated, although the latter will answer the purpose equally well, the patent is void, because he does not put the public in possession of his invention, or enable them to derive the same benefit which he himself

As to the first objection which has been taken with respect to the minium: it was not pretended by any of the plaintiff's witnesses that he ever made use of minium. And it was proved by the defendant's witnesses, that from the specification they should be led to use minium, because minium is lead already calcined, which is what the sepecification directs in the first instance. But minium will not answer the purpose. Then as to fusion: it is said that the public are directed by the words of the specification to continue the heat till the effeet is produced; which must necessarily lead to fusion, though fusion is not expressly mentioned. But that is no answer to the objection: for the specification should have shewn by what degree of heat the effect was to be produced. Now it does not mention fusion, and as one of the witnesses said in order to produce the effect "you must go out of the patent;" for fusion is beyond calcination, and in some sense contrary to it; and by mentioning calcination it should seem that fusion was to be avoided.

The next objection was as to the salts: "fossil salt" is mentioned as a distinct species of salt, and many other salts are also mentioned Tur R against Winter.

mentioned as indifferent whether one or the other be used. B t it was proved that fossil salt was a generic term including several species, and that "sal gem" was the only species of it which would answer the purpose; because none of the others contained a marine acid, which was essential.

There was no contradiction by the witnesses on the third objection; for the most that the plaintiff's witnesses said, was, that following the specification the experiment only produced

a white substance like lead.

Now on either of these grounds the patent is void. Because if the patentee says, that by one process he can produce three things, and he fails in any one, the consideration of his merit, and for which the patent was granted, fails, and the crown has been deceived in the grant. Slight defects in the specification will be sufficient to vacate the patent. In a case before Lord Mansfield for infringing a patent for steel trusses, it appeared that the patentee, in tempering the steel, rubbed it with tallow, which was of some use in the operation; and because this was omitted the specification was held to be insufficient, and the patent was avoided.

Rule absolute (v).

(a) Vide Bull. Will Pri. 3th Bd. [75] Wh.

Monday, Feb. 5th.

# MITCHELL and Others against EDIE.

When the HIS was an action on a policy of insurance on goods ea assured reboard the ship Lady Mansfield " from Jamaica to Lowceive intelligence of The defendant paid into court a sum of money on acsuch a loss count of an average loss. At the trial before Buller J. at the as entitles last Sittings at Guildhall, the cause was ultimately referred to them to aone of the jury to consider what was due to the plaintiffs, who bandon, they must found that nothing was due; and thereupon a verdict was enmake their tered for the defendant. And now, upon a motion for a new election in trial, the following facts were reported; the ship was captured the first instance; and in the course of her voyage by an American privateer, and a if they aban-few days afterwards the captor, having stripped her of her don, they stores, and part of her rigging, and having taken out some of must give the hands, set her at liberty. There was a clause in the policy tbe underwriters no to exempt the under-writers from average losses under 31. per tice in a rea-cent. And the part of her cargo taken out did not amount to that time; othersum. wise they wave their right to abandon and can only recover as for an average loss.

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sum. In consequence of this loss of part of the crew, it became impossible for the ship to pursue her voyage, and she was obliged to bear away to Charles Town, where she arrived MI ICHELL on the 18th of February 1782. She was there put into the hands of one Cruden, who was a part owner in the ship, and had Hkewise been engaged with one of the plaintiffs in former tr nsactions. Cruden in June 1782 sold the cargo, and received the whole profits of the sale but remitted home no part of In his books he had given the under-writers credit for the amount. At the time of the sale he was in bad circumstances, and afterwards became insolvent. In June 1783 Cruden came to England, and several applications were made to him on the part of the plaintiffs by Abil, who had concerns with the plaintiffs as well as with Cruden, and who said at the trial, that the plaintiffs had looked to Cruden for payment for two or three years; during all which time no notice of abandonment had been given by the plaintiffs to the under-writers.

The learned Judge then stated, that the first question which had been made was, whether the plaintiffs were entitled to recover as for a total loss. And as to this he was of opinion, that there had been a capture which for a time had occasioned a total loss, the owners had the option to abandon or not as they pleased; but if they chose to abandon, they ought to have done it immediately upon receiving intelligence of the loss; and that as they had not done so, but had looked to Cruden as their agent for payment, he was of opinion that they had waved their right to abandon, and could only recover as for an

average loss.

Another question was then made, how far the plaintiffs were entitled to an average loss above the sum paid into court which amounted to the difference between the produce of the sales at Charles Town, and the invoice. As to which, the plaintiffs contended that they were entitled to recover from the under-writers a charge of 51 per cent. commission on selling at Charles Town, and 51. per cent. more for remitting. That it had been referred to one of the jurymen to consider what was due for average, who had awarded that nothing was due.

Erskine, Mingay, and Baldwin, shewed cause against the fule. They allowed the right which the owners had to abandon in consequence of the capture, but argued that if they chose to abandon they ought to have done it in the first instance, as soon as they had received intelligence of the loss, and should immediately afterwards have signified their inten-

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tion to the under-writers. Here they had given no such notice of their intention, nor had informed the under-writers that the goods were placed in the hands of *Cruden*. On the contrary, the plaintiffs themselves had constantly looked to him as their agent. They had made repeated applications to him for payment; and had given him credit for the space of three years.

As to the question which was left to the arbitrator, it could only be, whether any and what average was due? That is, such an average loss as the under-writers were liable to pay by the terms of the policy; which must amount to 3 per cent. at least? For the moment it was determined that any average was due, the quantum could not involve a doubt; for an account had been delivered in, the correctness of which was not disputed, if the nature of the demand itself were well founded. It is admitted that the sum paid into court includes every thing but the claim for commission. Now wherever there has been such a loss as would entitle the parties to abandon, if they do not, they cannot afterwards claim any thing for commission; because if they elect to keep the cargo, they are only entitled to the average loss which it has sustained on the spot. And as to the manner in which the assured choose to dispose of it afterwards, it cannot be a matter for the concern of the under-writers, if the voyage is entirely put an end to. Besides, if the plaintiffs are entitled to charge commission for disposing of the property there, and transmitting the proceeds to Europe, the defendants on the other hand are entitled to set off the advantages arising from the discount of the bills; the exchange between Charles Town and London. being at that time, greatly in favour of the latter, which will more than counterbalance the claim of commission.

Bearcroft, Cowper, and Adam, on the other side contended, that they were entitled to a total loss; but if not to a total loss, yet to a greater average loss than had been paid into court. As to the First, This is a new question of insurance law which has never yet been decided. The rule of law, as it is to be collected from all the cases, seems to be, that, while every thing is done bona fide for the benefit of all the parties concerned, the assured are not obliged to abandon. Here the ship was condemned in consequence of a peril within the policy. It then became necessary to put the goods into the hands of some person; therefore it was not a voluntary act of the owners; and it was by mere accident that they got into the hands of Cruden; who, as far as relates to this transaction, was totally unconnected with the plaintiffs. Every thing was

lone in this instance for the preservation of the cargo, which he nature of the case would admit of. Had it not been for the capture, which was a peril insured against, the goods would MITCHELL never have got into the hands of Cruden. At one time it is Hear that the plaintiffs had a right to abandon. But then it is said, that from the great length of time which they suffered to elapse without giving notice to the under-writers, and from the correspondence which they held with Cruden, they had waved that right, and had adopted him as their agent. It never yet has been decided that the assured, having once a right to abandon, wave that right merely from the length of ime before they give notice, where the best is done for the benefit of all concerned. So far from the plaintiffs considering Cruden as their agent, they have pursued him adversely the whole time. Whatever time is consumed in making the pest of an average loss is ultimately for the benefit of the underwriters. The case of Plantamour and Staples (a), applies very

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(a) Plantamour and Others v. Staples, M. 22 G. 3. B. R.

This was an action on a policy of insurance on the ship Duras, at and from Murseilles to Madeira, the Cape, and the isles of France, and Bourbon, and to all parts and places where and whatsoever in the East Indies and Persia, or elsewhere beyond the Cape of Good Hope, from port to port, and from place to place, and luring her stay and trade to all ports and places, until her safe arrival back at her ast port of discharge in France, upon any kind of goods, also upon the body, Sc. of the ship.

There was also a count for money laid out and expended,

Without going into the cause, a verdict was taken for the plaintiffs, for 60%. 13s. 9d. subject to the opinion of the court upon the following case, which had

seen previously stated and agreed to by the parties.

The plaintiffs are merchants at Geneva, and on their own account and risk, by neans of their agents at Marzeilles, were interested in bullion and goods and merthandize shipped there on board the ship Duras, consigned to the plaintiffs' correspondents at Pondicberry, with directions to barter or sell the same on their acpoint, and to make the returns on the same to Europe in other goods, the produceor manufacture of India.

The plaintiffs were also interested in the said ship Dwas. The ship Dwas miled from France on the voyage insured in June 1776; and in the outward bound royage was by bad weather totally lost at the isles of France in April 1777. The roods on board sustained damage, but great part of the bullion, and a considera-sle part of the goods, were saved, and, without any authority from the under-wriers, sent forward in another ship to the plaintiffs' correspondents at Pondichery, who received and disposed of the same, and under the plaintiffs' orders investd the produce in other goods, the produce or manufacture of India, and shipped he same on the plaintiffs' account on board a ship called the Pere de Femille bound o France.

The Pere de Famille sailed from Pondicherry for France in August 1778; and in he course of her voyage home, was condemned at the isles of France, as unfit to proceed to Europe, whereupon the plaintiffs' goods were put on board another thip, called the Louisa Elizabeth, bound for France; which ship with the plainiffs' good so on board, sailed for France, and was afterwards taken by an English privateer, and has since, with all her cargo, been condemned.

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strongly to the present; and shows that where the sasured & the best they can for the benefit of the insurance, if nevertheles MITCHELL the goods are ultimately lost, the under-writer is liable to pa after any length of time has elapsed between the accident, which was the original cause of the loss, and the time when the demand was made on the insurer. There is besides in every police a clause which enables the assured, in case of any loss or ma fortune, to sue, labour and travail, for the recovery of the good, without prejudice to the insurance. This clause ought to be conatrued liberally and largely, as it is introduced for the benefit if the under-writers, who can in general be upon the spot when such losses happen. This clause necessarily allows the sesured as much time as they think proper to dispose of the carge in the best manner they can, before they exercise their right to abandon. But if in so doing they willingly do any act inconsistent with the benefit of all parties, they immediately los that right. It would be highly dangerous to establish the in each case the question of what circumstances amounted ma waver of the right of abandoning should be left to the jury.

> On the 29th August 1778 several of the under-writers on the policy signed: memorandum thereon, whereby they agreed to run the risk on the goods saved is aforesaid in any other ship or ships, until their safe arrival in France: but which agreement the defendant and several others of their under-writers refuse to in. or give their consent to.

> The defendant hath paid the whole of the average loss, occasioned by the has of the ship Duras, and by the damage of the plaintiffs' goods then on board.

> By the capture of the ship Louisa Elizabeth and of the goods, the plaintiffs me tained a loss of 121. 22. 2d. per cent. on the sum subscribed on the said policy, which has been paid by all the under-writers who signed the memorandum of the 29th August 1778.

> The question for the opinion of the court is, Whether the defendant is link to pay the said loss of 121. 2d. 9d. per cent, which the plaintiffs have so sustained by the capture and condemnation of the ship Louiss Elizabeth, and her cargo; or if not, whether the plaintiffs are entitled to any, and what, return of pre-

> After argument by Piggot for the plaintiffs, and Howarth for the defendant, Lord Mansfield. There is not a particle of doubt. The only question is, whether the shipping to Europe was necessary to the salvage. It is admitted that the defendant is liable upon the voyage to Pondicherry, though the goods west conveyed in another ship; therefore that circumstance makes no difference. The sale of the cargo is also admitted to have been necessary. Then how were the proceeds to be remitted to Europe? What was the best way of getting home the money for the benefit of the maured and the insurers? Beyond all doubt the best way was to invest it in other goods. Therefore, that being done which was the best that could be done, the underwriters are liable.

WILLES and ASHHURST, Justices, were of the same opinion.

BULLER, J. There is no case which expressly decides that the captain may invest the produce of the goods saved. But in Mills and Fletcher (a) it was decided that the captain has a general power, and is bound in duty to do the best for all concerned.

Postea to the Plaintiffs.

That right still continues in law, till the assured themselves have done some act that is inconsistent with the interest of all concerned. Reasonable time is always a question of law Mills LL (a), as in the case of a promissory note.

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As to the 2d point; the plaintiffs are clearly entitled to the commission, inasmuch as Gruden may call upon them for it, But if, on the contrary, any advantage was to be gained by the difference of exchange, (of which there is no evidence,) the agent would derive that benefit, and not the principal. defendant has admitted that there was an average loss by paying 41. 5s. per cent, into court; so that no other question could have been left to the arbitrator but that of the quantum.

Ashhurst, J. Two questions have been made in this 1st, Whether the plaintiffs are entitled, under these circumstances, to recover as for a total loss? Secondly, whee ther, under the reference to the arbitrator, he has done right

in awarding that nothing is due to the plaintiffs?

As to the first; I apprehend that the general rule is that where any part of the property insured has been saved, the assured cannot recover as for a total loss, unless he make his election to abandon, and give reasonable notice to the underwriter of his intention But it is contended that the assured never wave their right to abandon, while they are managing in the best manner they can for the benefit of all concerned; and that argument is grounded on the common clause inserted in every policy, whereby he is authorized "to sue, labour, and " travail, without prejudice to the insurance." Now this clause does not in thy apprehension warrant the position in so large an extent as it is contended for. It seems to me that the meaning of that clause is, that till the assured have been informed of what has happened, and have had an opportunity of exercising their own judgment, no act done by the master shall prejudice their right of abandonment. And that is reasonable; because, in general, the parties live in this country, and the loss may happen at a great distance, so that they cannot exercise their judgment immediately; it is therefore secessary that the master, who is on the spot, should do the best he can. But I think that the assured are bound to decide, and signify their election to the underwriters, whether they will abandon or not, the first opportunity; and for this reason, that though the person, who takes upon him to act on the occasion for the benefit of all concerned, is not the agent of the assured, yet if, upon receiving notice of the loss they do not Vol. I. Kkkk

(a.) Ante, 167.

against EDIE.

elect to abandon to the underwriters, then they adopt the act of such person, and make him their agent. This is something MITCHELL like the notice which is necessary to be given to the drawer of a bill of exchange, in case of non-payment, which if the holder omit to do, he is considered as giving credit to the acceptor, and therefore the loss, if any, must fall on him There may be cases where the previous acts of the master may not make him the agent of either party, and he only acts in common for them both, till notice is received by the parties at home. If after such notice he is continued in his ageney, he becomes the agent of the party by whom he is so confirmed; but he cannot be considered as the agent for the underwriters, till notice has been given to them and they have had an opportunity of exercising their discretion, whether they will or will not continue him; though till notice of the loss was first received by the assured, the property continued at the risk of the underwriters. Here it is plain that during the course of near three years Cruden was considered by the assured as their agent; credit was given to him in that character; frequent applications were made to him for payment; and till his insolvency, there was no appearance of any intration to disown him; that was the first moment when the assured thought of abandoning.

As to the second ground of objection: the reference to the arbitrator was to determine what was due for average. Now, supposing that, instead of saying that nothing was due, he had said that 41. 5s. per cent. was due; it could not have been contended that he had done wrong. This is precisely the same thing; for so much has already been paid into court; and there is nothing more due. This is right in substance; and there seems to be no ground for the court to grant a new trial for his inaccuracy in point of form; especially when they see that strict justice has been done between the parties.

BULLER, J. Two questions have been raised in this case; the one a particular one arising out of the circumstances of the case; the other a general question of great importance. As to the first, whether, on this reference, the arbitrator has so fardone wrong as to induce the court to interfere and set aside his award; at the trial there was much altercation with respect to the terms in which the reference should be made: but I thought it was of no consequence. In the course of the trial the plaintiffs produced a paper in court containing an ac-

count of what was due to them, one of the articles of which

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against EDIE.

was for commission. And the defendant never having seen it before, it was a proper subject of reference. I then thought, and still am of opinion that the plaintiffs were entitled to that MITCHELL commission; for when the cargo was carried to Carolina, they had an option of either having the goods sold on the spot, or of transmitting them to England; in which latter case they would have a right to charge the underwriters with all the expence of bringing them home, of which commission forms a part. And therefore, if it had stood on that ground, I should have thought that the plaintiffs would have been entitled to recover that sum. Nothing was said at the trial about the discount of 121. per cent. in favour of bills on England. But if the arbitrator made his determination on that ground, I think he has done right in taking that as a benefit on the other side. And it is not, as was argued, giving the underwriter the benefit of the market; for he is only answerable for bringing the money home; and in so doing he is liable to the charges, and entitled to the advantages of it. However, if the court should be of opinion that, upon the justice of the case, nothing is due, they ought not to send this down to be re-tried merely on a point of form.

As to the agency, this is one of the clearest cases that ever came before the court. When the owners were informed that the goods had got into the hands of Cruden, they made no objection; they applied to Gruden's correspondent here in order to obtain payment of their proportion; and they afterwards made applications to Gruden himself when he came to England; this is in every stage adopting his acts, and it is admit-

ting him as their agent.

Then the only question which remains is of general consequence. Whether the owners are entitled to recover as for a total loss? It is true that the owners are not bound to abandon; there never was a case which determined that they were; on the contrary, all the cases have said that where they are entitled to abandon, if any part of the property exists, they have the option whether they will abandon it or not. total loss is of two sorts; one, where in fact the whole of the property perishes; the other, where the property exists, but the voyage is lost, or the expence of pursuing it exceeds the benefit arising from it. I am of the same opinion with my brother Ashhurst, that, where the voyage is lost, but the property is saved, the owners have an option to abandon; but that unless they do elect to abandon, it is only an average loss. Whether many years ago it might not have been wiser for the courts to have determined that the owners should againet Epis.

should not in any case abandon where the property did exist, is not for our consideration. About the year 1745 that MITCHBLE question was determined after much deliberation: but still unless the owners do some act, signifying their intention to abandon, it is only a partial loss. The case cited by the defendant's counsel does not apply here. It was no part of the consideration of the court there, whether the event which happened in the outward-bound voyage should entitle the assured to recover as for a total loss: but the ground of that decision was, that, in the homeward bound voyage, the ship was captured and condemned, which occasioned a total loss. The only question there was, whether the owners, by the act of shifting the goods from one ship to another, had precluded themselves from recovering on the policy? But in that case, as the assured had done every thing for the benefit of the cargo, the court thought they were entitled to recover.

Then the only point to be considered is, whether this doctrine will be productive of any uncertainty? If it would, that would be a sufficient reason in a new case for not adopting it. But, in my opinion a contrary decision would be productive of infinite uncertainty. For it would leave open a very vague question, namely, what time the assured should be allowed to abandon. If it can extend to three years, there is no reason why it should not to a much longer period. But no uncertainty can follow from this determination; for our opinion is, that when the account of a loss has reached the assured, they must make their election whether they will abandon or not; if they do they must give notice of their intention to the underwriters within a reasonable time. If they act otherwise they cannot be permitted at any subsequent period to change

the partial into a total loss.

The court then observed, that as a verdict had been entered under a mistake, it must be altered, and a

Nonsuit entered.

Tues lay, Feb. 6th.

# SEWARD against BAKER.

A general indebitatu**s** assumpsit will lie for tolls.

THIS was an action upon promises for petit customs. The plaintiff in the twelve first counts of the declartion, claimed several duties by a prescriptive right under the mayor and burgesses of Southampton; the five last counts stated generally, that the defendant was indebted in a certain

1m for tolls and duties; and that he promised to pay, &c. 'o these counts the defendant demurred, and shewed the folwing causes: that it does not appear by those counts, or any r either of them, what tolls or duties are meant to be claimd or demanded, and for that the said plaintiff hath not, in nd by those counts, or any or either of them, shewn, or set orth, what tolls or duties are payable in particular for any pecific goods imported in the manner in those respective ounts mentioned; or how, or why, such tolls became and re payable; nor hath shewn that any goods liable to the paynent of tolls or duties have been imported by the said defendnt; and for that the said plaintiff hath not in and by those ounts, or any or either of them, shewn any right or title in timself, by grant, prescription, or ownership of the said port, or any part thereof, or by any other means whatsoever, to laim, demand, have, and receive, any tolls or duties, for any tind of goods imported as aforesaid; and for that it does not appear to the court here, nor is it averred in and by those counts, or any or either of them, that the said tolls and duties thereby claimed are reasonable tolls and duties; and for that those counts, and each and every of them, are, and is, much too general, and do not contain any certain claims or demands so described as to enable the said defendant to answer or defend himself against the same; and the said last mentioned counts, are and each and every of them is, in various other respects, defective, insufficient and informal, &c.

Bower, in support of the demurrer, observed that it was an indisputable rule in pleading, that the declaration must shew a title in the plaintiff to a common intent. And where the plaintiff claims my thing in derogation of the common rights of the subject, he must shew how he claims it. Less certainty perhaps is sufficient where the right to the thing claimed lies within the knowledge of both parties: but where the right is only known to the plaintiff, a general indebitatus assumpsit will not lie. 10 Co. 77. a. He admitted that port duties from their nature imported a right in some person: but he insisted that on these counts it did not appear to whom these duties belong-The defendant could not possibly know that they had been demised to the plaintiff. In the case of goods sold and delivered, an indebitatus assumpsit is sufficient, because the declaration states, that they are sold and delivered at the special instance and request of the defendant; so that such a claim must be within the defendant's knowledge, and then it becomes

SEWARB against BAKER. 1787. SEWARD against BAKER.

becomes a good ground for an implied assumptit. This case cannot be governed by that of The Mayor of Yarmouth v. Eater (a), where the court held that such a right as the present may be prescribed for, because here the plaintiff has not set out any prescriptive right in these counts. If this had been a general demurrer, it would perhaps have admitted the promise. according to the case of The Mayor of Exeter v. Trimlet (b); there the Court said, "we give no positive opinion as " to the second count, (which was a general indebitatus as-" sumpsit for petit customs,) but we incline to think that this " is also well enough upon a general demurrer:" but it does not follow that it would have been good on a special demurter; and indeed the very reverse is fairly to be inferred from the language of the court. For there are many things good on a general, which cannot be supported on a special demurrer. And it is observable that, in all former cases, the plaintiff has shewn some title, and the question has been upon the sufficiency of that title: but in the present, no title whatever is shewn.

Marshall, contra, was stopped by the court.

ASHHURST, J. It has been the constant practice since my time to declare for tolls in this general way; and it is certainly the most beneficial way for the plaintiff, and does not subject him to be turned round on every captious objection. In the case cited from Wilson there was no occasion for the court to give any opinion whether the declaration would have been good on a special demurrer, because that was a case of

general demurrer.

BULLER, J. The practice has been universal to declare in this manner, first, by a special, and then by a general count. The objections have been artfully divided in the special canses, but they are all resolvable into one, which is the real question, whether a general indebitatus assumpsit will lie for tolls? And on that point the cases are all one way. Supposing an actual promise had been made, there could have been no doubt but that this form of declaring would have been pro-Then if an actual promise would maintain this action, an implied one will likewise do so: the declaration is therefore good in form, for the court cannot see on the record, whether there has been an express or implied promise. The great objection which has been raised is, that this claim is against common right, and therefore that the plaintiff's title must be plainly shown. But there are many cases where that is not 1 m. H. Rep. 21. 10 East 104. necessary;

(a) Burr. 1402. (b) 2 Wila. 95.

mecessary; such as the case of a fine for an admission to copyhold lands; there the plaintiff's title as lord is not set forth. in the declaration, and yet it has always been held that an in- Saward debitatus assumpsit will lie for fines. Astle v. Grant, Dougl, 695. Evelyn v. Chichester, 3 Burr. 1717. So also indebitatus assumpsit will lie for the profits of an office. And yet in these cases the court are not informed on the record what the plaintiff's title is; neither is it within the defendant's knowledge on what title he means to rely.

1787. againet BAKER

Judgment for the plaintiff.

#### WINCH against KEELEY.

Tuesday Feb. 6th,

NDEBITATUS assumpsit for work and labour, money The aspaid, laid out, and expended, money lent, and on an ac-signor of a count stated.

tion, who Pleas 1st, Non assumpsit. 2dly, That after the day of ma-is become a king the promises, &c. the plaintiff became a bankrupt, &c. bankrupt, and that his commissioners assigned over his effects to the may sue the and that his commissioners assigned over his execus to the debtor for assignees, &c. by virtue of which he the defendant is charge- the benefit able to pay the sums of money mentioned in the declaration of the to the assignees, &c. 3dly, Set of for goods sold and deliver-assignee. ed, money paid, laid out, and expended, money lent, and for A debt due to a bankmoney due on an account stated. rupt, as

The replication admitted the matters contained in the 2d trustee forplea to be true; and as to all the promises in the declaration another, mentioned and all the sums therein contained, except as to pass under 731. 12s. 9d. parcel, &e. the plaintiff acknowledged that he the assignwould not further prosecute. Then the replication proceeded ment of his as follows; and as to that sum, he says that, before the time his commisthat the plaintiff became a bankrupt in manner and form as sioners. the defendant hath in his said plea alleged, the said defendant was indebted to him the said plaintiff in the several sums of money in the said declaration mentioned, and that he the said plaintiff was also indebted to the said defendant in certain other large sums of money; and that upon an account fairly and justly taken between the said plaintiff and the said defendant there was then due and owing from the defendant to him the said plaintiff, on the balance of such account, the sum of 731. 12s. 9d. for and on account of the several sums of momey in the third and fourth counts of the said declaration mentioned.

Winch ogamet Kreen

mentioned, over and above all sums of money whatsoever de and owing from the said plaintiff to the said defendant, that is to say at Westminster aforesaid; and the said plaintiff farther saith, that he the said plaintiff, before the time that he became and was a bankrupt in manner and form as in the said plea mentioned, to wit on the 20th of October 1785, at Westminster aforesaid, in the said county, became, and was justly indebted to one Joseph Searle in a large sum of money, to wit, in the sum of 731. 12s. 9d. And, being so indebted, he the said plaintiff afterwards, to wit, on the day and year last aforesaid, and before he became a bankrupt, to wit, at Westminster aforesaid, in the county aforesaid, by his certain deed poll, sealed with the seal of him the said plaintiff, which said deed he the said plaintiff brings here into court, the date whereof, &c. in consideration of the said sum of money so as aforesaid due and owing from him the said plaintiff to the said Joseph Searle, did bargain, sell, assign, and transfer to the said Joseph Searle the said sum of 731, 12s. 9d. parcel of the money in the said declaration mentioned; to hold the same to the said Joseph Searle from thenceforth to his own proper use, under a certain proviso therein and herein after mentioned; and did thereby constitute and appoint the said Joseph Searle his true and lawful attorney irrevocably, and did give and grant unto him, his executors and administrators, full power and authority in his name, to the only proper use and behoof of the said Joseph, to ask demand, and sue for, the aforesaid sum of 734,12. 3d. Provided always, that if he the said plaintiff, his executors or administrators, should well and truly pay, or cause to be paid unto the said Joseph the said sum of 73L 12s. 9d. so due and owing to him as aforesaid, within two calendar months after the date of those presents, then the said deed poll, and every article and clause therein contained should be void; as by the said deed poll, relation being theremso had, may more fully appear. And the said plaintiff further saith, that he did not, at any time within the space of two calendar months after the date of the said deed, pay to the said Yoseph the said sum of 73l. 12s. 9d. so due and owing to him as aforesaid, but that the same hath from thence hitherto remained due and unpaid from the said plaintiff to the said Yoseph; and that the original writ in this suit was sued out in the name of him the said plaintiff for and on the behalf of the said Joseph Searle, and for the purpose of enabling the said Foseph Searle to receive the said sum of 73L 12s. 9d. parcel of

Winch against

KEBLEYA

the said sums in the said declaration mentioned, according to the form and effect of the said deed poll, and not for the benefit, use, or behoof, of the said plaintiff, that is to say, at Westminster aforesaid, in the county aforesaid; and this he is ready to verify, wherefore he prays judgment, &c. as to the said 731. 12s. 9d. To this replication there was a general demurrer and joinder.

Morgan, in support of the demurrer, contended that this debt, being a chose in action, could not be assigned. Co. Litt. 214. a. 2 Rol. Abr. 45. F. 6. Although the king by his prerogative may assign a chose in action, yet his grantee cannot. Cro. Eliz. 180. Bills of exchange are assignable by the law of merchants: but promissory notes can only be assigned under the 3 & 4 Ann. c. 9. which shews that at common law they could not. That being the law generally, that inconvenience will result from permitting persons subject to the bankrupt laws to assign over their effects to particular creditors on the

eve of a bankruptcy.

Lawrence contra, did not dispute the general principle; and admitted that if the action had been brought in the name of Searle, those case's would have applied; and that this assignment could not have been supported if it had been fraudulent. But he observed that the question here was, whether a chose in action can be assigned for an antecedent debt, so that the assignee may recover on it in the name of the assignor. The cases cited only prove that the action cannot be maintained by the, assignee. It cannot now be disputed that courts of equity will protect a chose in action when assigned; and courts of law have frequently permitted the assignee to sue in the name of the assignor. A court of equity has held such an assignment to be good, even though the assignor afterwards became a bankrupt. Unwin v. Oliver, cited by Lord Mansfield, in 1 Burr. 481. Ex parte Byas, 1 Atk. 124. If then such an assignment be good in a court of equity, the only question is, whether or not this court will take notice of such a trust. Now courts of law have taken notice of trusts in many instances. In the case of Bottomley v. Brooke (a), which was debt on bond, the defendant pleaded that the bond was given for securing 10% lent to the defendant by one E. Chancellor, and was given by her direction to the plaintiff in trust for her, and that E. Chancellor, before the action brought, was indebted to the defendant in more money than the amount of the bond: to this there Vol. I. LIII

<sup>(</sup>a) M. 22 G. 3. C. B. Vide 2 Black. Rep. 1271.

WI CH against KEELEY.

was a demurrer, which was withdrawn by the advice of the court. So that the court there did not look to the person legally entitled, but to her who was beneficially interested in the The authority of this case was afterwards recognized in that of Rudge v. Birch (a) in this court, where, to debt on bond the defendant pleaded, that the bond was given to the plaintiff in trust for A. for a debt due from the defendant to A.; and that A. at the time of exhibiting the plaintiff's bill was indebted to the defendant in more money. The plaintiff demurred, and the court, on the authority of the case of Bottomley v. Brooke, held this to be a good plea. It has likewise been since recognized in Webster v. Scales (b), where it was held by the court that a bankrupt's interest as a trustee was not assignable by the commissioners. Immediately on this assignment the plaintiff became a mere trustee; if so, this case falls within the principle of that of Webster v. Scales. For by the 1 Fac. 1. c. 15. s. 15. the commissioners are only empowered to assign those things which are for the benefit of the bankrupt. Therefore this debt could not pass under the assignment from the bankrupt's commissioners to his assignees; because, when recovered, it cannot be applied to the bankrupt's benefit.

Morgan in reply. There is no doubt but a chose in action may be assigned in equity: but the question here is, whether it can be so assigned in a court of law. In Bottomley v. Brooke, the parties had only done what they lawfully might; the bond was originally given to the plaintiff for the benefit of Mrs. Chancellor; and on an account between her and the defendant she would have been found indebted to him: but no question there arose concerning the assignment of a chose in action. In the case of Rudge and Birch the plaintiff was a trustee: but here the plaintiff is not to be considered in that light: because he was the original debtor, and unless he could assign a chose in action, his interest in the bond is now vested in his assign

nees.

ASHHURST, J. The cases which have been cited by the plaintiff's counsel go a great way in determining this question. It is true that formerly the courts of law did not take notice of an equity or a trust; for trusts are within the original jurisdiction of a court of equity; but of late years, it has been found productive of great expence to send the parties to the other side of the Hall; wherever this court have seen that the justice

(a) M. 25 G. 3. B. R.

(b) M. 25 Geo. 3.

WINCH against KEBLEY.

iustice of the case has been clearly with the plaintiff, they have not turned him round upon this objection. Then if this court will take notice of a trust why should they not of an equity. It is certainly true that a chose in action cannot strictly be assigned: but this court will take notice of a trust, and consider who is beneficially interested; as in Bottomley v. Brooke, where the court suffered the defendant to set off a debt due from Mrs. Chancellor in the same manner as if the action had been brought by her. The only difference between that case and this is, that there the plaintiff himself was not originally interested in the debt, but this plaintiff was: but that does not make any essential difference; because if it be once established that this court will take notice of trusts, it is immaterial whether the person who sues were originally a trustee or afterwards be-Nor is it material at what time they became a trustee: for whether he became such by the assignment, or was so originally, it is sufficient to say that he is a trustee now, and as such has a right to maintain this action. If this had been a fraudulent assignment, it would have raised a different question: but on these pleadings it must be taken to have been assigned for a valuable consideration. The case of Wcbster and Scales is in point; and on the authority of that and on the other cases cited, I am of opinion that the plaintiff may recover.

BULLER, J. This action is brought in the name of the assignor of this bond; and therefore it does not involve in it the question whether a chose in action may be so assigned as to give a legal title to the assignee. The plea only says, that the plaintiff is become a bankrupt, and that this debt is transferred to his assignees; the answer to that is, that this is a debt due in form to the plaintiff, but in substance to a third person; and therefore it is not such a debt as passed under the commission; if not, it is still in the plaintiff, and he is entitled to maintain this action. The statute of the 1 Jac. 1. c. 15. only says that such debts are to be assigned as are for the benefit of the bankrupt. This construction was put upon the statute soon after it passed in a case in March 38; where it was held that such things as the bankrupt held as trustee did not pass under the commission. Here it must be taken on these pleadings that this debt did not pass under the commission; therefore it remained in the bankrupt, and he may maintain this action.

Judgment for the plaintiff (a).

(a' Vid. post. 4 vol. 341.

1787. Tuesday. Peb. 6th.

### SOUTHCOTE against BRAITHWAITE.

As bail in RULE to shew cause why an exoneretur should not be a error cannot Rule to shew cause why an exoneretur should not be a error cannot Rule to shew cause why an exoneretur should not be a error cannot Rule to shew cause why an exoneretur should not be a error cannot Rule to shew cause why an exoneretur should not be a error cannot Rule to shew cause why an exoneretur should not be a error cannot Rule to shew cause why an exoneretur should not be a error cannot Rule to shew cause why an exoneretur should not be a error cannot Rule to shew cause why an exoneretur should not be a error cannot Rule to shew cause why an exoneretur should not be a error cannot Rule to shew cause why an exoneretur should not be a error cannot Rule to shew cause why an exoneretur should not be a error cannot Rule to shew cause why an exoneretur should not be a error cannot Rule to shew cause why an exoneretur should not be a error cannot Rule to shew cause why an exoneretur should not be a error cannot Rule to shew cause why an exoneretur should not be a error cannot rule to shew cause which is a contract to shew cause which is surrender come a bankrupt pending the writ of error, and having ob the principal, they are tained his certificate.

not entitled to relief. though the

Cowper and Piggot shewed cause, and observed that this was not like the case of bail to the action; for by the statut principal be- 16 & 17 Car. 2. c. 8. bail in error are liable at all evenuin comeabank case judgment is affirmed. They cannot surrender the pris-

rupt per ding cipa. the writ of

error.

Chambre, contra, contended that the general rule was, the bail are entitled to be relieved before they are fixed, namely, before the debt, for which they are to answer conditionally, becomes their own. Now in this case the debt is not yet the debt of the bail, because judgment is not yet affirmed. The principal having become a bankrupt, the debt must fall on the bail, if they are not relieved, and they cannot prove this dex under the commission against the principal.

ASHHURST, J. The Court will never order an exonercturto be entered, but where the bail have a right to surrender the principal. But that is not the case with bail in error, who have not the alternative of surrendering the principal. And though the principal be himself discharged by his bankrupty,

yet the plaintiff may have recourse to the bail.

BULLER, J. Where there are bail to an action, and the principal becomes a bankrupt before they are fixed, they ought in strictness to surrender the principal, who being a bankup would be immediately entitled to be discharged. the court to avoid circuity have done that directly, which the could only otherwise do indirectly. But that is never dost in favour of bail in error, because they cannot surrender the principal at all.

Rule discharged

The KING against The Churchwardens and Overseers of MADDERN.

Friday,

HE following order was returned by certiorari from the If the name of any person both the appeal of John Hoskins against a rate for the reted in a rate lief of the poor of the parish of Muddern, in the county of Corn-made for the wall, the following notice was produced, which had been served for the ed on the churchwardens and overseers of Maddern: "I do justices hereby give you notice, that I do intend to enter into, and ought to try, such appeal at the next general quarter-sessions of the quash the peace to be holden, &c. for that my objection to the said rate, amend it by

or assessment, and my reason for appealing therefrom, and adding his

" my charging it to be partial, unfair, unequal, and unjust, is name (a). that you have left out and omitted in the said rate, or assessment, the name of the Reverend Wm. Borlase, as vicar of " the said parish of Maddern, and neglected to charge, rate, " and assess him for the small tithes, dues, obventions, obse lations, and offerings, due and payable to him as the vicar of the said parish of Maddern, and liable to be rated and assessed towards the relief of the poor of the said parish of " Maddern, at the time of making the said rate or assessment, and for some time before." The advocates for the appellant moved to quash the rate for the omission stated in the notice, which was objected to by the advocates for the parish officers who were respondents. They insisted that under this notice, and for one omission only, the court ought and were bound to amend the same; and it then appeared that the solicitor for the appellant had omitted to give any notice to Wm. Borlase, of the intention of adding him to the rate. The advocates for the respondents moved the dismission of the appeal on the above grounds; but in as much as they did not shew to this court the value of such tithes, whereby they might amend the said rate, if notice had been given, this court, for such omission of the said William Borlase, and not being able in this case to amend it, do quash the same; subject however to the opinion of the court of King's Bench.

A rule had been obtained to shew cause why the above order of sessions, quashing the rate, should not be quashed; 1st, Because no notice had been given by the appellant to Borlase, that his name ought to have been added to the rate; and 2dly, Because the rate itself ought to have been amended, and not

quashed.

Gibba

<sup>(4)</sup> But where a person is overcharged, the sessions may amend the rate, under the 17 Geo. 2. c. 38. R. v. Inbab. of Cheshunt, post, 2 vol. 623.

The Over-

Gibbs now shewed cause. As to the first objection: no netice was necessary to be given to the person whose name was The King omitted: the statute 17 Geo. 2. c. 38. only requiring notice to be given to the churchwardens and overseers. In answer to the second, this was a case in which the rate could not be amend-MADDERN. ed. It was quashed on account of the omission of a person, whose name ought to have been inserted; and if he had been added, it would necessarily have made an alteration in the sum to be paid by every person rated. Such an alteration would have affected the whole rate, in which case the statute (a) expressly directs the justices to set aside the rate itself. In R. v. St. Catherine's Gloucester (b), the owner of a number of houses had been rated for them all in gross, and the sessions on appeal quashed the rate, because the occupiers should have been rated severally; on a motion to quash that order, because, it was contended, the sessions should have amended the rate under the statute 17 Geo. 2. c. 38. s. 6. by inserting those persons who were improperly omitted; Lord Mansfield said, "The sessions could not amend it. It is a wrong rate; "persons are not rated who ought to have been, and the in. " sertion of their names would alter the other assessments." In the case of the King v. Sandwich (c) this court held that the sessions had done right in quashing the rate; which consider. ably shakes the authority of the case of The King v. Witney (d), If the sessions did right in quashing this rate, no question can arise here on the value of Borlase's tithes; it is immaterial what the value was.

Lawrence and Lambe in support of the rule. First, The notice given to the parish officers was not sufficient. It was determined in The King v. Andover (e) that no person could be added to a rate, to whom notice had not been given: now the case expressly states that no notice was given to Borlase. The sessions therefore ought either to have dismissed the appeal, because the appellant had not given the regular notice so as to bring the question under their consideration, or to have adjourned the appeal according to the directions of the statute (f). As to the 2d question: it is the invariable practice of the sessions not to quash the whole rate on account of the omission of one person, but to amend it by adding the name of the person omitted. The 6th section of the 17 G. 2. c. 38. enacts, that "on all appeals from rates, the justices shall "amend the same in such manner only as shall be necessary " for giving relief, without altering such rates with respect to " other

<sup>(</sup>a) 17 G. 2. c. 38 s. 6. (b) Tr. 16 G. 3. B. R. (c) Dougl. 541, Cald. 105. (d) 4 Burr. 2634. (e) Cowp. 550. (f) 17 G. 2. c. 38. 4.4.

other persons mentioned in the same; but if upon an appeal 1787. from the whole rate, it shall be found necessary to set aside the same, then they shall order a new rate to be made." The Kine If this had been an objection to the whole rate, the argument The Overon the other side would apply: but the objection is, that the name of one person was omitted; his name therefore should MADDERNA have been added according to the first part of the 6th section of the statute; and the addition of his name need not necessarily have made an alteration in the sum to be paid by every other person rated, because at the most it would only have aised a larger sum. Besides the argument which has been irged against the rule would prevent the alteration of every ate, in every case, and would render nugatory the statute of 7 Geo. 2. c. 38. which was passed purposely to avoid so much rouble and expence. 'This construction has been put on the statute in two cases before this court, namely, The King v. Vitney (a), and The King v. Ringwood (b). And though the ormer of those cases was sent here in order to try another luestion, whether stock in trade was rateable, yet the court letermined it on the ground that the sessions ought to have mended the rate: the court there held, that "The sessions 'ought to have amended the rate by relieving those persons 'who had been overcharged, and charging those who had been improperly omitted." And in the latter case, Lord Mansfield said, " The case of The King v. Witney was deter-' mined upon the single ground that the justices in sessions 'should not have quashed the whole rate; (which, in cases 'where it is not absolutely necessary, they are forbid to do ' by the 17 G. 2. c. 38. s. 6;) but should have amended it by 'inserting the particular persons, and that property, which ' was omitted, and which they thought rateable." These auhorities go expressly to shew that this rate should have been mended and not quashed.

Cur. adv. vult.

Ashhurst, J. now delivered the opinion of the Court. There have been two objections made. First, That no otice was given to *Borlase*, whose name was omitted in the ate. 2dly, That at all events the rate should not have been uashed, but amended. As to the first of these objections there eems to be no ground for it. The statute 17 G. 2. c. 38. says, he party aggrieved may appeal to the next quarter sessions giving.

(a) 5 Burr. 2634.

(b) Cowp. 326.

againet

giving reasonable notice to the churchwardens and overseens the poor of the parish, &c. and says nothing of any other The Kine son : neither does the nature of the case require it. For the against complaint is against the churchwardens and overseers, in the Overseers of having done injustice to the rest of the parish by their hang MADDERN, left out persons who ought to be rated, and by those man imposed a greater burthen on those who are rated that the should have done. It then becomes their business walk proper steps to gain all necessary information; and there still less occasion for giving notice to the individual, if the justices ought to quash the rate and make a new one.

As to the second objection; we are of opinion that the justices have done right in quashing the rate. For though this is the case only of a single person omitted, it is impossed to draw the line; and it might as well be the case of its which would impose upon the rest of the parish a greater be den than they ought to bear. And it is not enough was that the more money is raised by the rate, the longer it ri last; for it may be an inconvenience to many persons to m at once double the sum which is necessary to be raised for it immediate purposes of the parish. The case of The Le against The Churchwardens of St. Catherine's Gloucester, & There the objection to the rate was the leaving of of the late Mr. Pitt's tenants for which the sessions quasir The court said the justices had done right; for if all proper persons had been rated, of course a less sum would have been requisite from the rest of the parish. As to the card The King against The Inhabitants of Witney (a); the point before the Court was, whether stock in trade ought to k The court said " the sessions had not stated with "the stock in trade was, or what it was that the rate has "taxed, or whether the persons rated had any stock, " " what that stock in trade was, nor any particular descrip-"tion what trade was meant." The Court indeed is matt to say further, that, on quashing the old rate, a new out ought to have been made: but that was not the point of And indeed it may seem which the decision turned. doubtful whether the justices are the proper persons b perform this office; as the consequence of adding a per set and description of persons would be, that a great are ny enquiries must be made, which would exceed the hound of the justices sitting; and besides the party, if over rated ought to have an opportunity of appealing, which I do so

(a) 5 Burr. 2634.

know that he could have from one quarter sessions to another. The making of a rate is in its nature a ministerial, and not a judicial act. For though they exercise a judgment in saying The KING he ought to be rated, yet the quantum is a matter of fact, according to the value of the estate; against all which, after the seers of rate is made, he ought to have the liberty of appealing. There- Mappears fore, on the whole we are of opinion that the Rule must be discharged (a).

(a) Vide R. v. St. Agnes, post. 3, vol. 481.

## HEARTLEY and Others against BATESON and Others. Feb. 9th.

THE declaration was filed in Easter term last; the defen- A plaintiff is dant pleaded and paid money into court in the same term. all the costs The issue was delivered by the plaintiff in the Trinity term till the time following, with notice of trial for the 6th of July, which he of the decountermanded on the 3d of July. And an application was fendant's made to the defendant's attorney for the amount of the costs ney into down to the time of paying the money into court, with an of-court, notfer to allow the subsequent costs, and settle the balance which-withs andever way it might be; the defendant's attorney refused, in- wards pro-sisting that he was entitled to his costs from the commence- ceeds in the ment of the action.

On which the plaintiff obtained a rule to shew cause why the master should not be directed to tax the costs of the plaintiff to the time of paying the money into court, and the defendant's costs from that time to the time of countermanding the notice of trial; and why the defendant should not pay the ba-

lance to the plaintiff.

Lawrence, against the rule, cited Sayer 196.

Russell in support of it.

Per Curiam. On enquiring of the Master, it appears to be the constant and regular practice that the plaintiff is entitled to have his costs to the time of paying money into court, and the defendant all his subsequent costs.

Rule absolute (a).

Vol. I.

M mm m

ROE,

(a) Vane v. Mecbell, Barnes 284. Griffiths v. Williams, post. 710. But if on the terial a juror be withdrawn, each party must pay his own costs, though money has been paid into court. Stodbart v. Johnston, post. 3 vol. 657. So if the application he not made before trial. Streemson v. Yorke, post. 4 vol. 10.

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1787. Friday, Feb. 9th.

ROE, on the demise of NIGHTINGALE and MARY his WIFE, against QUARTLEY and CONSTANTIA his WIFE.

A devise to the right heirs of husband and wife is a devise to such person as answers the description of heir to both. namely, a child of both, and it no preceding father and child shall take as a purchaser.

FJECTMENT for premises in Buckingham, on the dea mise of Nightingale and wife, laid 26th December 1784, and tried by consent in London, at the last Sittings, before Buller, Justice. Verdict for the plaintiff, subject to the opinion of the Court on a case which stated in substance as follows:

Charles Blant, being seised in fee of the premises in question, by a codicil to his will devised the same "to Hester Read, "daughter of Walter Read, and to the heirs of her body for " ever, and for default of such issue then to such child or chil-" dren as the wife of Walter Read is now ensient with, and to " the heirs of the body or bodies of such child or children, and " for default of such issue to the right heir of Walter Read and estate be gi- 4. Mary his wife for ever." Hester Read entered on the death of the testator, and afterwards and before the day of the demise mother, such died seised, without issue, intestate, and without having barred the entail, leaving Mary Nightingale, one of the lessors of the plaintiff, her cousin and heir at law on the part of the father. Both Walter and Mary Read died in the life-time of Mary Read, who was not ensient when the codicil Hester. was made, nor had any child afterwards, died before her husband; he married again and had issue of that marriage one child only, the above named Constantia, the wife of Quartley. The question for the opinion of the Court is, whether the plaintiff is entitled to recover the whole, or any, and what part, of the premises?

Le Blane, for the plaintiff, after observing that the single question arose upon the last limitation over to the right heirs of W. and M. Read, contended that Hester Read took an estate tail to herself with a contingent limitation in fee expectant on the event of W. and M. Read dying in her life-time without leaving any other child. During the lives of W. and M. Read this limitation was contingent; and on their deaths it vested in Hester as a purchaser, no antecedent estate having been li-1 Rep. 104. Co. Lit. 26. b. Doug. mited to her ancestor. Then if Hester took by purchase and not by descent, the person claiming under her must claim as her heir, which entirely excludes Constantia, who is a sister of the half blood.

Hester,

ROE

Hester, who was living at the time of the death of W. and M. 1787. Read, came in as heir at law to them both. The heirs of husband and wife are the same as their issue, because they are but one person in law. Where a joint estate is made to husband and wife and a third person, the husband and wife shall have but one moiety. Co. Lit. 187. a. Then by a parity of reason the same distinction must take place between the right heirs of husband and wife and of any other person. A limitation to the right heirs of A, and B, is a limitation to the right heirs of each of them; but the heir of the husband and wife is the heir of both. 2 Ro. Abr. 416. F. 1. 1 Ro. Rep. 238. Dy. 99. 1 Leon. 102. If that distinction be well found. ed, Hester took the whole; because at the time of the death of W. and M. she was the only issue of that marriage. And the intention of the testator favours this argument; for he first limited the estate to Hester the only child of W. and M. then in being; the next object of his bounty was the child with which Mary might be ensient; and then he limited it to the right heirs of W. and M.; so that his intention manifestly was to continue the estate in the heirs of both W. and M. If this construction prevail, the lessors of the plaintiff are entitled to take the whole estate. But if no distinction can be made between the right heirs of husband and wife, and the right heirs of two other persons, at least the lessors of the plaintiff are entitled to a moiety of this estate, and to a moiety of another moiety. For, at the death of her mother, Hester was entitled to one moiety, and on the death of her father to half of another moiety as co-heir with the sister of the half blood; so that she took three-fourths of the whole estate. And he cited the following authorities to shew that, in cases of limitations to the right heirs of two persons who are not husband and wife, the heirs take as tenants in common and not as joint-tenants. Lit. Sect. 283. Co. Lit. 188. a. 5 Rep. 8. a. 13 Rep. 57. 2 Ro. Ab. 89. G. 1.

Partridge for the defendant. On the true construction of this will, and the circumstances which have happened subsequent to the death of the testator, the lessors of the plaintiff are not entitled to any part of the premises; but at the most, only to a moiety. First, the limitation to the right heirs of W. and M. did not vest in Hester, it being too remote: in which case the lessors of the plaintiff are not entitled to any part of these premises. The limitation was contingent, depending upon the event of Hester's outliving her parents: but

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being to take effect after the death of a person without issue, which person was not in being at the time of its creation, it was too remote to take effect at all. It is hid down in 2 Res. 51. b. "That if a lease be made for life, remainder to the "right heirs of J. S. there being no such person as J. S. in being at the time of the limitation, but such a person is af-" terwards born and dies during the life of the tenant for life, " nevertheless the limitation over is void." The present limitation is still more remote; for that was to the heir of a person not in existence, but this is to a person not in being, and to his issue. He admitted that executory devises had been carried beyond this line, because they are permitted to sake effect within twenty-one years after a life in being. But if a limitation can take effect as a remainder, the Court will rather consider it as such than as an executory devise. And this is admitted by the plaintiff's counsel to be a contingent remainder: if so. Hester was not so seised as to transmit the estate to her heirs, and then the title of the lessors of the plaintiff falls to the ground. In Co. Lit. 14. b. It is said "that if land be " given to a man and his wife, and the heirs of their two be-" dies, remainder to the heirs of the husband, and they have " issue a son, and the wife dieth, and he taketh another wife " and hath issue a son, the father dieth, the eldest son entereth " and dieth without issue, the second brother of the half-blood 46 shall inherit; because the eldest son by his entry was not " actually seised of the fee-simple, being expectant, but only " of the estate tail. That shews that the remainder did not take effect in the son during the continuance of the estate tail, and goes the whole length of deciding the present case. doctrine was recognized by Lord Hardwicke in Gunning ham v. Moody (a). The limitation therefore to the right heirs of W. and M. was not such as to give a vested interest in it to Harter during her life. But if the Court should be of a different opinion, it will then be necessary to consider the effect of this remainder. With respect to the testator's intention, it seems that he had in contemplation the possible event of this family dying without any child, and his intention was to limit the estate to their heir general. For, as he used technical words, he was apprized of their legal import; therefore by the limitation to the right heirs of W. and M. he did not mean to confine it to their issue only; if that had been his intention, he would have said to the heirs of their bodies. But by the and de

(a) 1 Vez. 174.

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against

and s right heirs he meant to limit the estate to the right heirs the survivor of W. and M. or to their respective heirs. If te former, Constantia took a moiety on the death of Walter; the latter, on the death of Mary, Hester took one moiety, and QUARTLEY the death of Walter, Hester and Constantia took the other. piety as joint-tenants; therefore on the death of Hester, Conntia took the whole of that moiety by survivorship. But pen if that argument should not succeed, at all events Conuntia was entitled to a fourth part as co-heiress with her sister. The statute 10 & 11 W. 3. c. 16. has Le Blanc in reply. mt posthumous children exactly in the same situation with hildren in being at the time. Therefore since the passing of hat statute a limitation to a child en ventre sa mere is as a linitation to a child in being; so that the limitation over was not too remote in its creation. And independent of that, this a contingent remainder, there being a precedent estate to apport it; it must take effect as such, and not as an executory levise; and it vested in Hester. The next objection is, that the heirs of Hester cannot take, because she was never seised of this reversion; but this is a limitation to the heirs of two persons, who did not take any thing themselves; in which case their heirs take as purchasers, and that distinguishes it from the cases cited by the defendant's counsel, where the ancestor took by the same instrument; for then the rule, according to Shelley's case (a), is, that the heir shall take by descent. Court should be of opinion with the plaintiff on this ground, the only remaining question will be as to the quantum of interest which the lessors shall take. The manifest intention of the testator was to give a preference to the children of the marriage. It is admitted by the defendant's counsel, that, Hester would have taken the whole, if the testator had used the words "heirs of the body:" but there can be no difference between those words and such as he has used. Besides, the distinction before taken holds between the right heirs of husband and wife and the right heirs of two other persons not standing in that relation. But at all events, if the person to take need not be child of both. Hester was entitled to threefourths of the whole.

The Court said, they had no doubt upon any part of the case, except as to the quantum which the lessors of the plaintiff were entitled to; and they would consider of that point.

ASHRURST,

(a) 1 Co. 88.

1787.

Ashhurst, J. After stating the case, now delivered the opinion of the Court.

Ror againm QUARTLBY

Several objections have been taken on the part of the defendant to the plaintiff's right of recovering. The first which goes to the right to recover any part is, that this limitation to the right heirs of Walter and Mary is too remote, for which was cited 2 Co. 5. This objection seems not to have been much relied on by the defendant's counsel; and indeed since the statute 10 & 11 W. 3. c. 16. which puts posthumous children on the same footing with children born in the life-time of the ancestor, this objection seems to be removed, whatever might have been the case before. Besides, the limitation must vest on the death of Walter and his wife, and might have been barred by the tenant in tail; therefore there was no danger of a perpetuity. The limitation then being a good limitation as a contingent remainder, the next question is, who took, and in what manner, after the death of Walter and his wife. And as to this we are of opinion that Hester took the whole, not by way of limitation, but as a purchaser, and under the description of right heir of Walter and Mary, in the same manner as she would have done, if the limitation had been to the right heir of the body of Walter and Mary. That the party shall take as a purchaser under such a description, seems to be established by the case of Allen v. Palmer, Leon. 101. where the limitation of a copyhold was to the use of a stranger for life, and afterwards to the use of the right heirs of the copyholder. The Court said, the difference is where the surrender is to the use of himself for life, afterwards to another in tail, and the remainder to the right heirs of him who surrendered; there, his heir shall have it by descent. But it is otherwise where the surrenderor hath not an estate for life, or in tail limited to him; for there his heir shall enter as a purchaser, as if such use had been limited to the right heirs of a stranger. This case therefore is distinguishable from the case put in Co. Lit. 14. b.; for there the husband, to whose right heirs the remainder was limited, had an antecedent estate, and therefore the reversion in fee descended, and, remaining expectant on the estate-tail, it remained as it were in abeyance; and therefore the brother of the half-blood, being heir to the father, after the death of the elder brother, took. But in the present case, there being no limitation to the father, but the first limitation being to the heir, on the death of the father, it must vest in Hester.

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But it has been argued that this description of the right heirs of Walter and Mary must either mean the heirs of the survivor, or else it must mean to give an estate in moieties to the heirs of each: and if so, the plaintiff can only be entitled to a QUARTLEY moiety. But we are of opinion that the heirs of Hester ought to take the whole. In the first place we think that it may plainly be collected from the will that such was the testator's intention, which ought in all cases to govern, if not contrary to any rule of law. His bounty seems to be confined to the children of Walter and Mary; he first entailed it upon Hester and her issue; then he devised it to the child Mary might be then ensient with in tail; and then he limited the remainder in fee to their heirs. Now it is impossible that any person can answer the description of heir to both, unless he be a child of both; and such construction should be put upon a will, if it may be, as will fully satisfy the words; and the words here are satisfied, if they be taken to mean the children of both of them.

It is to be collected from the passage cited from Co. Lit. 187. a. "that a grant to husband and wife is not considered in " the same light as a grant to other persons; for if a joint es-" tate be made to husband and wife and a third person, in " this case the husband and wife have, in law, in their right " but the moiety, and the third person shall have as much as " the husband and wife; for the husband and wife are but one " person in law:" And "so if made to a husband and wife and " two others, in this case the husband and wife shall have but " a third." If then they are but as one person, by reason of the relation they stand in, when a limitation is made to their heirs without any prior estate limited to them, it must most naturally mean heirs to them both according to that relation, which can only be children of them both. Therefore we think the lessors of the plaintiff are entitled to recover under this eiectment.

Postea to the plaintiff.

## COOK against RAVEN.

Saturdey. Feb 10th.

DULE to shew cause why the proceedings in this cause A demand should not be set aside for irregularity, because there had of a pleabebeen no demand of a plea. In fact there had been a demand of fore the dea plea; but at that time the defendant had not appeared, neither appeared, or

had the plaintiff filed com-

mon bail for him, is a nullity.

Cook against RAVEN.

had the plaintiff filed common bail according to the statute, though he afterwards did so, and before judgment signed.

Runnington, against the rule, insisted, that it was sufficient if common bail were filed any time before judgment signed.

Shepherd, in support of the rule. At the time of demanding a plea, the defendant was not in court; so that it was a mere nullity. And

The Court, after consulting the Master, were of that opinion.

Rule absolute (a).

(a) Vide Smith v. Painter, post, 2 vol. 719; and Venn v. Calvert, post. 4. vol. 578.

Saturday, Feb. 10th.

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pleadings.

### GUNDRY against STURT.

Where a de-RESPASS on lands on a certain day, and on divers other claration in days, &c. The defendant pleaded two special pleas of trespass consists of one justification on the particular day. The plaintiff, in two new assignments, replied that the trespass was committed on other count only, the defenddays and other occasions, &c. On both these issues were taant justifies ken, which were found for the plaintiff with 1s. damages, part of it, the trial the trespass appeared to be wilful, because it was and the plaintiff new committed after a written notice: but in point of fact there assigns. was no certificate by the Judge that the trespass was wilful without ta-A rule had been obtained by Lawrence to shew cause why the king issue Master should not be directed to tax the plaintiff his costs on on the special plea, the special pleas. And it was agreed by both parties to consiand obtains der this question as if the judge had granted a certificate, he a verdict, he is entitled being ready to certify. to the costs

Gibbs now shewed cause. This is similar to a case where the plaintiff, in his declaration, complains of three several trespasses in three distinct counts; if the defendant plead two special pleas of justification to two of those counts, and the plaintiff abandon them, he is not entitled to the costs of those pleas, even though he should succeed on the third; in which particular the practice of this court differs from that of the Common Pleas (a). Now in this case the plaintiff has comprehended several trespasses in one count, and the defendant was under the necessity of justifying one of those trespasses in order to lessen the damages; and, as the plaintiff has not taken issue on the special pleas, he confesses the truth of them. and is in the same situation in which he would have been if his declaration had consisted of three counts, and he had abasdoned two of them on the defendant's justifying. The defendant in this case does not ask for costs; his objection is, that the plaintiff is not entitled to have them.

Ashhurst,

ASHHURST, J. The Master says, it has always been the practice to allow the plaintiff the costs of the pleadings in such cases as the present. If the plaintiff had taken issues on the

special pleas, it would have been different.

BULLER, J. This is not like the case of a declaration, consisting of several counts, to some of which only there are pleas of justification. The plaintiff here, perhaps with a view to have costs, has taken in the whole complaint in one count; the defendant, by his pleas, did not justify the whole; and therefore the plaintiff was obliged to make a new assignment. The Master says he had no doubt in this case; and, according to the constant practice, the plaintiff is entitled to all the costs of the pleadings. Rule absolute (a).

(a) Vide Day v. Hanks, post. 3 vol. 654.

## BATES Qui Tam against LOCKWOOD.

TPON an application by Baldwin to enter judgment nunc pro tune, it appeared that a judgment had been obtained Where an in an original suit in this court in Hilary term 25 Geo. 3. be-action is brought on a tween these parties. In Easter term following, an action was judgment brought by the plaintiff upon the judgment, to which the de-recovered in sendant pleaded nul tiel record. After verdict and judgment this court, for the plaintiff a writ of error was brought in the Exchequer judgment Chamber; and the defendant obtained a rule to stay proceed- the defendings in the mean time. In Hilary term 26 Geo. 3. the defend- aut brings ant in error died before judgment was affirmed; and in Trini-2 writ of erty term following, his attorney signed judgment in the second tains a rule That judgment was set aside this term for irregula- to stay prority, upon which the present rule was obtained.

Chambre, against the rule, said that no terms were imposed time, and at the time of granting the rule to stay proceedings; but it the plaintiff had been drawn up in the common form. That the court would dies before be less sendy to comply with the present motion, as it was for judgment

the purpose of fixing the bail.

Bearcreft and Baldwin, contra, insisted that it was a matter will not perwithin the discretion of the court, and that there were many mit judgcases to warrant it (a).

The court cannot grant this motion, as it pro tunc. ASHBURST, J.

was no part of the terms when the proceedings were stayed. Vol. I. Nnnn BULLER,

(a) Vide 1 Burr. 147, 226.

1787. GUNDRY against STURT.

the court mentito be entered nunc

Monday. Feb. 12th.

1787. BATES against Lockwood.

BULLER I. There is a distinction between the cases where an action is brought upon a judgment of the court of Common Pleas, and where brought upon a judgment of this court. the first case the court will not stay proceedings pending a writ of error, without the defendant's giving judgment in the second action. But if it be brought upon a judgment in this court, these terms make no part of the rule; because in general, actions on judgments are vexatious, and the plaintiff might have his execution on the first judgment. The cases where judgment has been permitted to be entered nunc pro tunc have been where the delay has proceeded from the act of the court. I think there have been some cases where, there having been a frivolous delay, the court has interposed, and has not suffered any advantage to be taken of it; but where a party proceeds according to the common course of law, by bringing a writ of error, there the court cannot interfere.

Rule discharged.

Monday. Feb. 12th. Sir RICHARD HOTHAM, Knight, and Another, against The EAST INDIA COMPANY.

A covenant in a charter party " that no claim should be allowance made for short tonnage, *unless* such short tonnage be found and pear on her taken by four shipwrights to be indifferties," is not

a condition

OVENANT on a charter-party of affreightments. The declaration, after stating several parts of the charter-party, by which it appeared that the plaintiffs had let their ship, The Royal Admiral, to the defendants for a voyage to the East admitted, or Indies and back again, stated the following covenant on which the breach was assigned: "That, notwithstanding the ship was let to freight but for 903 tons, yet the Company should lade on board as many goods as the ship could bring, or was capable of taking in with safety, paying to the said owners freight for the same, according to the tonnage a-In a former part of the charter-party, stated made to ap- foresaid." in the declaration, is the following covenant; "And to survey to be the end the tonnage of the said ship, and the freight thereby payable, might be the better ascertained, it was thereby covenanted that no claim should be admitted, or allowance made by the defendants, for short tonnage or defiently chosen ciency in loading the said ship in or for her homeward by both par-bound voyage, unless the same should be certified by the defendants'

precedent to the plaintiff's right of recovering for short tonnage; but is a matter of defence, to be taken advantage of by the defendants; and the not averring the performance is no ground for arresting the judgment. If defendants prevent the performance of a condition precedent by their neglect and detault, it is equal to performance by plaintiffs.

fendants' president, agents, or chiefs and councils, or supercargoes, from whence she should receive her last dispatch, which said certificate the said presidents, agents, or chiefs and HOTHAM councils, or supercargoes respectively, should give to the against master for the time being, if reasonably demanded; and also unless such short tennage be found and made to appear on her Company. arrival in the river Thames upon a survey to be taken by four shipwrights, or others, to be indifferently named and chosen by the defendants and the plaintiffs; but no such survey would be taken or allowance made, in case bulk should be found to have been broken before demand for such short tonnage was made."

The declaration then stated, that, although the defendants loaded and put on board the said ship goods, &c. to the amount of 903 tons; and although the said ship could have brought, and was capable of taking in, with safety, goods, &c. to the amount of 100 tons more than the 903 tons, and more than were loaden and put on board the said ship by the defendants, their factors or assigns, from Bombay to London: and although the defendants, their factors and assigns, had notice of the premises last aforesaid before the ship sailed and departed from the East Indies on her voyage to England, and were then and there required to load the said ship with the residue of the said goods, &c. so as to complete her loading, and put on board her for the said voyage what she could reasonably and safely have carried; and although the plaintiffs offered to take in such loading, yet the defendants, their factors and assigns, absolutely refused fully to load the said ship, or to put any more goods, &c. on board her; and the said ship, by means whereof, was obliged to sail from Bombay to London deficient in her loading to the amount of 100 tons; neither have the defendants yet paid to the plaintiffs any freight or any sum of money for the said deficiency, but have refused, &c.

The defendants pleaded, first, that the ship was not capable of taking in more than 903 tons, on which issue was And secondly, that the allowance claimed for short tonnage and deficiency in loading the ship, was not certified

by the Company's president, agents, &c.

Replication, that the plaintiffs requested the Company's president, agents, &c. to certify the deficiency, and that they wholly refused. Rejoinder, taking issue on that fact.

This cause was tried at the sittings at Guildhall after last term, when the jury found a verdict for the plaintiffs on both the issues.

A motion

1787. HOTHAM against The E. ST I DIA

A motion was made in arrest of judgment this term by Law, because the plaintiffs had not averred in their declaration that a certificate of short tonnage was obtained from the defendant's servants before the ship sailed from India; and because it was not averred, that upon her arrival in the river COMPANY. Thames, and before bulk was broken, a survey was had, and that such short tonnage was found and made to appear.

> Erskine, Mingay, Buldwin, and Watson, shewed cause. an action of covenant it is not necessary for the plaintiffs to set forth more in their declaration than that part on which the breach is assigned. And if there be any condition or proviso for the defendant's benefit, they must take advantage of it by pleading. 1 Lev. 88. The covenant, which was the foundation of the present rule, consists of two distinct parts; and the one which is pleaded by the defendants is independent of the other. Now nothing is more clear than that it was not necessary for the plaintiffs to aver that there had been a survey, because it is a proviso to be taken advantage of by the defendants. They have pleaded the first, and it was found against them; as to that therefore there is a justification on the record. If the covenant had run, that short tonnage should only be recovered, provided there had been a survey, the not having had a survey would have been a condition precedent, and must have been averred by the plaintiffs. standing in the form and place which it now does in the instrument, it is entirely distinct from the subsequent covenant on the part of the defendants to allow for more freight if the ship would take more. But even supposing that it is necessary that a survey should have been had, after verdict the Court will presume that there has been one. For the defendants having relied in their plea upon the other proviso, and taken no notice of this, they have waved taking advantage of it by their silence. In East and Essington (a) the plaintiff declared upon a bill of exchange set out in these words, pray pay this my first bill of exchange, my second and third not being paid: A motion was made in arrest of judgment that there was no averment that the second and third were not paid, which, it was contended, was a condition precedent. But the court were of opinion, that it must be intended after verdict. In the present case there is in fact an averment that the ship was short loaded, and that the defendants had notice of it, so that the survey was unnecessary;

> > (a) 1 Salk. 130. 2 Ld. Raym. 810. S. C.

the fast must therefore be presumed after verdict, as the defendants have not taken issue upon it; and there is a verdict for the plaintiffs on the whole record. In Vivian v. Shipping (a) the declaration stated, that in consideration the plaintiff against assumed to stand to the award of J. S. and J. D. and if he failed, to pay the defendant 40/., the defendant assumed in the COMPANT. same manner to pay 40% to the plaintiff if he did not perform; the declaration then stated that the arbitrators awarded that the plaintiff should pay the defendant 10% and in consideration thereof that the defendant should be bound in an obligation of 80% that the plaintiff should enjoy certain copyhold lands, &c. or that he would upon request pay him 40% and then alleged in fact that although he had performed the award on his part, and had on such a day and place required the de. fendant to enter into such a bond, yet that he had not done it, nor had paid him the 40% according to his promise. The defendant pleaded no award, which was found against him. was moved in arrest of judgment, that the plaintiff had not alleged payment of the 10% and the award is conditional for the payment thereof, and because it was not alleged that he had made special request for the payment of the 40%, in that case, though the Court differed as to whether the award was conditional, yet they all agreed that though it was a condition pre. codent, yet when the plaintiff says that he has performed the award on his side, it shall be intended that he hath performed it after verdict found for him, and it is good in substance, though not in form. These provisoes are in the copulative, and not in the disjunctive; and the survey without the certificate would have been of no avail; therefore the defendants have superseded the necessity of the former, by depriving the plaintiffs of the latter.

Bearcroft, Rous, and Daw, in support of the rule. In an action of covenant, a plaintiff, in order to entitle himself to damages, must state upon the face of the declaration a clear legal demand. And though it is only necessary to set forth such parts of a deed of covenant as are essential to support his title, yet if he takes upon himself to state a proviso, which would have been a matter of defence for the defendant, he must aver performance of it. It is apparent on this record that the plaintiffs are not entitled to recover, unless they have performed two conditions which are precedent to their right of action.

1787. against The East IMDIA

If therefore they be conditions precedent, the plaintiffs should have averred performance; but whether precedent or subse-HOTHAM quent, as the plaintiffs have undertaken to state these conditions in their declaration, they have made it incumbent on themselves to shew that they have been performed. The true rule COMPANY: with respect to covenants precedent or subsequent, or whether distinct or not, is laid down by Lord Mansfield, in the case of Jones v. Berkley (a), who said "that the dependance or independance of covenants was to be collected from the evident " sense and meaning of the parties; and however transposed " they might be in the deed, their precedence must depend on " the order of time in which the intent of the transaction re-" quires their performance." That both these are strict conditions precedent to the plaintiff's right of recovery, and as the plaintiffs have stipulated by their contract that they shall be performed, that before they can recover they must shew that they have been complied with, (however difficult to be performed,) appears from the cases of White v. Middleton (b), and Davis v. Mure (c). The first of those was an action by the owner of a ship, employed in the government service, against the commissioners of the navy for freight. stated a general proviso, inserted in all those charter-parties, " that on its being made appear that there had been a loss of "time or negligence in the owner, a mulct by way of reduc-"tion of freight should be imposed, such as the commission-" ers should adjudge," &c. That the plaintiff had been guilty of a breach of orders; that it had been made appear, and that, by the judgment of the commissioners, this mulct had been assessed. The plaintiff in his replication traversed the breach; to this there was a general demurrer. The court thought the proviso was good, and said there could not be a doubt but that the commissioners were, by the proviso, judges of the delinquency as well as of the quantum. In that case, the question was by the charter-party referred to the decision of a particular tribunal, and if the commissioners had imposed a mulct equal to the freight, the plaintiff could not have recovered at all; so here, the plaintiffs are not entitled to recover under this contract entered into with the defendants. unless a certificate was given by the defendant's presidents. &c. and unless a survey was actually made, and it did appear that there was short tonnage. The case of Davis v. Mure was an action to recover the value of a ship against the person to whom she was let to freight. The declaration after reciting (among

<sup>(</sup>b) Hill 24 Geo. 3. B. R. (a) Dougl 665. (c) Davis, otherwise Davidson v. Mure and Others, M. 22 Geo. 3. B. R.

(among other things) the following clause, "and it is further " covenanted that if the said ship shall happen to be burned, " sunk, or taken, during the time she shall be in his majesty's " service, and it shall appear to a court martial that the master " and ship's company have made the utmost defence they were " able, the value of her shall be paid by the defendants," then CONFANY, stated that the ship sailed with provisions for the use of the army in America, under convoy of the Mercury, and was separated and taken; with an averment that the master of the ship and the ship's company did make the utmost defence they were able, and that it would have appeared to a court martial, &c. if the defendants had thought proper to have had an inquiry made in that respect by a court martial. To this the defendants pleaded, 1st, That she was not captured: 2dly, That she did not make the utmost defence: 3dly, That it would not have appeared to a court martial, &c. And 4thly, That it hath not appeared, &c. The plaintiff took issue on the three first, which were found for him; and demurred generally to the fourth, which was argued. The court at first doubted whether the ship was to be considered in the service of government at the time of her capture: but it was agreed on all sides that ships were considered in the service when they were laden for the king's use, and under orders of a king's ship. The Court directed an inquiry to be made at the Admiralty, as to the usage of holding courts martial on such occasions, when it appeared that there were several instances, in the war before the last, of courts martial to enquire of losses in the merchants' service, but none in the last war; and it did not appear on whose requisitions they were held. After argument by the plaintiff's counsel, that the enquiring by a court martial was not a condition precedent, the Court, without hearing the other side, were of opinion that the charter party annexed an express condition that it should appear to a court martial, &c. and therefore the plaintiff was bound to shew that it had appeared, or that it arose from the fault of the defendants that it had not; and judgment was given for the defendant. it was necessary in that case for the plaintiff to shew that it had appeared, &c. to a court martial before his right of action vested; so in the present case the production of the certificate, and the fact that short tonnage was found and had appeared upon a survey, were necessary to give the plaintiff a right of ac-In vain was it argued in that case that it was not in the plaintiff's power to procure a court martial; for the answer to

1787. HOTHAM against The EAST INDIA

againet The East

such argument was, that if a person choose to make his dek arise on a contingency almost impossible, ic is his own fault HOTHAM Therefore here it is no answer to the objection against the plaintiffs recovering, arising from the want of a certificate and the neglect of having had a survey, that they could not procure a COMPANY, certificate, and that the defendants did not appoint their shipwrights to survey, because they have stipulated by their contract that a certificate should in fact be given by the defeadant's agents abroad, and that short tonnage should appear upon a survey to be made at home, before their right of action should It was likewise held by the Court in the case of Pole v. Harrobin (a), that if a party chose to make a debt depend on a condition, however difficult to be performed, he must take the consequences. If however the Court should be of opinion that a sufficient excuse for not complying with the former part of this condition, with respect to the certificate, appears upon the record, because the plaintiffs did every thing they could in order to procure it; yet the same reason does not apply to the latter part; for the plaintiffs should have shewn that they had taken all necessary steps to have a survey, as by naming two surveyors on their part; and then if the defendants had not named two other surveyors, or had prevented the survey being made, there might perhaps have been the same excuse for not complying with the second part of the condition. But it does not appear on the record that the plaintiffs took any steps to perform their part of the condition. In the case of East and Essingden, there was no previous act to be done by the plaintiff to entitle him to recover; it was not necessary to aver that the second and third bills had not been paid; for if no thing were shewn to the contrary, it was to be taken for granted that they were not paid. The objection there was requiring proof of a negative. And in fact though the bills were three: in number, yet the contract was one and the same; so that if the defendant had shewn that he had paid one, the Court must: have seen that he had discharged the others. But in the present case it was incumbent on the plaintiffs to do some act before they were entitled to make a demand; and that disting sishes it from the cases cited.

The court took time to consider; and now.

A SHHURST, J. delivered their opinion (after stating the pleadings).

The

(a) E. 22 Geo. 3.

1786. againet The Bast

The objections that have been made are, that the certificate revious to the ship's sailing from the East Indies, and the urvey after her arrival in the Thames are conditions precedent Hotham o the plaintiffs' right to recover for short tomage; and being uch, and performance not being averred, it is a radical defect n the plaintiff's title, and is not cured by a verdict, but is ob- Company. ectionable in arrest of judgment. And if they were right in heir premises, namely, that these are conditions precedent, the conclusions which they draw from it would be right. It becomes necessary then to be considered whether these are conlitions precedent or not? Now in order to clear this point, I would first premise, that there are no precise technical words equired in a deed to make a stipulation a condition precedent, or subsequent; neither doth it depend on the circumstance, whether the clause is placed prior or posterior in the deed, so that it operates as a proviso or covenant. For the same words have been construed to operate as either the one or the other, according the nature of the transaction. The merits therefore of the question must depend on the nature of the contract, and the acts to be performed by the contracting parties, and the subsequent facts disclosed on the record, which have happened in consequence of this contract. It is unnecessary to say whether the clause relative to the certificate be a condition precedent or not; for granting it to be a condition precedent, yet the plaintiffs having taken all proper steps to obtain the certificate, and it being rendered impossible to be performed by the neglect and default of the company's agents, which the jury have found to be the case, it is equal to performance. If it were necessary to cite any case for this, which is evident from common sense, it was so held in Roll's Abridgment, 445. and many other books. If so, there was a right of action once fairly vested in the plaintiffs, from the defendants not having fully laden the ship before she left India, which they were by their covenant bound to do. all that is necessary prima facie to found an action of covenant upon is, that the covenant should be broken. And this right of action, once vested, was only capable of being devested by a subsequent non-feazance, namely, by not taking the proper steps to procure a survey after the arrival of the ship in the river Thames. This therefore being a circumstance, the omission of which was to defeat the plaintiffs' right of action, once vested, whether called by the name of a proviso by way of defeazance, or a condition subsequent, it must in its nature 0000 Vol. I.

be a matter of defence, and ought, to be shewn by the defendants; and as they have not insisted on it, though they have insisted on the want of a certificate, we must, after verdict, take it that the fact did not exist; and it will follow as a content of the East India sequence that there is no ground for arresting the judgment, Company, and that the rule must be discharged.

Rule discharged,

END OF HILARY TERM.

## CASES

### ARGUED AND DETERMINED

IN THE

# COURT OF KING'S BENCH,

## EASTER TERM. IN THE TWENTY-SEVENTH YEAR OF THE REIGN OF GEORGE HL

In this Term William Cockell Esq. of Gray's Inn, was called to the degree of Serjeant at law. The Motto on his Rings was, Stat Lege (orona. But in consequence of a late Regulation no Kings were given to the Judges, the Bar, or the Attornies:

## CLISSOLD against CLISSOLD.

Wednesday. Abril 25th

INVILSON moved to change the venue from London to Berk- The venue shire in this action, which was for a libel contained in a in an action letter written by the defendant in Berkshire, and directed into for a libel, in a letter, Surry; which The Gourt refused, because the defendant could not make one county

the usual affidavit that the cause of action arose wholly (a) in and sent in-Berkshire and not elsewhere.

to another, cannot be

changed Into the county in which it was written (b), because the defendant cannot swear that the cause of action arose wholly in that county. Rule refused.

(a) Vid. 1 Wile. 178. Pinkney v. Colline, ante, 571.

(b) Secue, if sent into the same county. Freeman v. Norris, post. 3 vol. 306. Or, if sent out of England in a letter. Metcalf v. Markbam, post. 3 vol. 652.

## BUCKLEY against BUCKLEY.

Friday, April 27th,

HIS action which was brought against the defendant A tenant to upon the 11 Geo. 2. c. 19, s. 12. for secreting an eject-a morgament, was tried at the last Leicester assizes before Heath I. when gor, who des not the give him

notice of an ejectment brought by the mortgagee to enforce an attornment, is not flable to the penalties of the 11 Geo. 2. c. 19, s. 12. for secreting ejectments.

BUCKLEY

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BUCKLEY

the plaintiff was nonsuited. It appeared that in 1785 the premises being in mortgage, and the mortgage forfeited, the defendant (who was tenant to the plaintiff) had agreed, in a conversation which he had with the attorney of the mortgagee, to attorn to him from that time; but the attorney, not thinking the promise sufficient, delivered to the defendant an ejectment in April 1785, informing him at the same time that it was only for the purpose of procuring a written attornment, and that it would not be prosecuted further; in consequence of which the defendant actually attorned to the mortgagee. He gave no notice to the landlord, either of the ejectment or of the attornment; for omitting the former of which this action was The learned judge, being of opinion that this case did not come within the statute, nonsuited the plaintiff; which nonsuit

Balguy now moved to set aside; contending that the secreting of this ejectment was productive of some of the inconveniencies which the act intended to remedy, because by these means the mortgagor had been prevented applying to this court to stay the proceedings of the ejectment on paying the

principal, interest, and costs.

The Court however were of opinion that this case did not come within the statute; for that it only extended to cases where ejectments were brought which were inconsistent with the landlord's title. They observed likewise that the ejectment was brought for the purpose of compelling the tenant to attorn to the mortgagee, which the act expressly permitted him to do.

Rule refused.

Friday, April 27th:

## BORTHWICK against CARRUTHERS.

If plaintiff TO an action for goods sold and delivered, the defendant reply to a pleaded, amongst other things, infancy. plea of inreplied, that after the defendant had attained his age of twentyfancy, that defendant one years, he ratified and confirmed the several promises and unafter he atdertakings, &c. To this the defendant rejoined, that he did tained 21 not, after he had attained his age of twenty-one years, ratify confirmed the promise, and confirm the promises, &c. and thereupon issue was join. ard defended. On the trial before Buller, J. at the last Sittings at Westant rejoin minster, the plaintiff proved a promise by the defendant, and that he did not: plaintiff rested his case there. The counsel for the defendant contends need only ed that the plaintiff had not proved the whole of his replicaprove a pro-· tion; mise, and defendant must

shew he was under age at the time:

on; for that it was incumbent on him to shew that the deendant was of age at the time when the promise proved was
ade. But Buller, J. being of opinion that the proof of inancy lay on the defendant, within whose knowledge the fact
ras, and who wished to take advantage of it, the plaintiff obained a verdict.

BORTH-WICK against CARRU-

A motion was made by Gibbs to set aside the verdict and nter a nonsuit upon the ground that, the plaintiff having aleged in his replication that the defendant was of age at the ime of confirming the promise, it became necessary for him to rove him to be so. That it was a material allegation to support the plaintiff's replication; and if it were necessary to alege it, it was also necessary to prove it.

ASHHURST, J. This was a fact, which, if true, rested withn the knowledge of the defendant, and which it might be impossible for the plaintiff to be able to prove. In general such
a fact is proved by a copy of the register of the baptism, which
the plaintiff may not know where to find; and in some instances, as in case of a private baptism, is not possibly within
his power; therefore the proof of the fact lay upon the defen-

dant.

Buller, J. I do not agree with the general position, to the extent in which it has been laid down, that the plaintiff is bound to prove every thing that he alleges. For in actions on the game laws, although it is necessary to allege that the defendant was not qualified, yet the plaintiff need only prove the offence, and then, if the defendant is really qualified, it is incumbent on him to shew it. In the present case, the defence arises from a personal incapacity to contract, which lies only within the defendant's knowledge, and which therefore he ought to prove.

GROSE, J. It was sufficient in this case for the plaintiff to prove the promise; and it was incumbent on the defendant to prove infancy, if he had meant to take advantage of it; for it is to be presumed that, when a man contracts, he is of proper

age to contract, until the contrary be shewn.

Rule refused.

1787:

Friday. April 27th. The BISHOP of CHICHESTER against HARWARD and WEBBER.

should not issue to prohibit the Bishop of Chichester

**Prohibition** "HIS was a rule to shew cause why a writ of prohibition issued to the Bishop of from proceeding against Mr. Harward, who was Dean, and Chichester who claimed Mr. Webber, one of the canons residentiary, of the said a right to present by lapse under pretence of to the office of a canon of his church, it being a freehold office, of election thereto in the Dean case the Dean and Chapter negiect or point a catatorial

power may

church, upon his mandate, directing them to admit George Metcalf, clerk, to be a canon residentiary of that church. The suggestion stated, that the office of a canon residentishis visitato- ry was an office of trust in matters ecclesiastical and temporal. rial author ty and endowed with divers tenements, rents, &c. vious to the year 1574 all the 31 canons of the church were residentiary residentiaries, when an ordinance was made to reduce the number to four, besides the Dean. That the right of election of a canon residentiary was in the Dean and Chapter, who themselves admit, institute, and induct. That the Bishop and the right is not visitor as to such elections, nor hath any visitatorial power or jurisdiction over the Dean and Chapter in that respect, nor hath any right to appoint to the vacant place and ofand Chapter, fice of a canon residentiary by lapse or otherwise. That in March Whether, in 1784 the office of one of the canons residentiary became vacant by the death of Dr. Hurdis. That in August 1784 the Dean and Chapter met to elect a successor, when there were two candidates; but, they being equally divided, no election refuse to ap- was made. That in October 1784 another meeting was held, non residen. when they were again equally divided. That the Bishop by tiary in pro- his monition, dated 4th of January 1785, (reciting these proper time the ceedings, and that, by reason of such failure in the election viriue of his of a canon residentiary, the Chapter was then incomplete. general visi- and the service of the church neglected, and that two of the prebendaries had appealed to him, complaining of the proceedings,) cited the Dean and Chapter to appear before appoint pro tempore, till him on a particular day, and to submit to his visitation, such election to shew cause why they had not filled up the vacancy occa-be had, qui sioned by the death of Dr. Hurdis, and why he the Bishop should not by his power and authority, ordinary and visitatorial, fill up the said vacancy, by reason that the right of so doing had devolved upon him for that turn, by default of the Chapter in not filling up the vacancy, in the time. That by another mandate of the Bishop, dated 19th of January 1785, (reciting that the Dean and Chapter

not having shewn sufficient cause why he should not fill up he said vacancy, he had appointed Mr. Metcalf to be a canon esidentiary in the room of Dr. Hurdis,) he commanded the The Bishop Dean and Chapter to admit Mr. Metcalf into actual residence: and that the Bishop is still endeavouring to compel the deendants to admit Mr. Metcalf, notwithstanding their allega- HARWARD ions against his right.

of CHI-GHESTER against & WEB-

Erskine, Piggot, and Ibbetson, now shewed cause, and conended that the Bishop had not exceeded that visitatorial power which was vested in him by the common law. 2 Ro. Abr. 229. letter D. pl. 1. 10 Rep. 28. Dyer 273. Canons, 1603. That this appeared more strongly by a reference to the antient constitution of the church, which was originally served by all he 31 prebendaries till the year 1574, when on account of the lecrease of the revenues of the church the number was redued to four, who on account of their additional labour had an ncrease of salary. The Bishop therefore in this case had not aken upon himself to present to a freehold; for by the original appointment to the office of prebend the freehold was conveyed, and the increase of the salary, which the residentiaries reeive, was paid out of the general fund of the corporation. was the peculiar duty of the Bishop to take care that the funcions of the church were performed.

So far therefore from his exceeding his authority in the preent instance, he had only discharged his duty. At any rate this application came too soon, no other person having hither-

to been elected by the Dean and Chapter.

Bearcroft, Mingay, Rous, and Steele, who were to have ar-

zued in support of the rule, were stopped by the Court.

ASHBURST, J. If the Bishop had appointed to this office only till a proper election had been made by the Dean and Chapter, I should have thought that the matter would have leserved much greater consideration than the present question. But there is a great difference between a temporary appointment by the Bishop, and his claiming a right by lapse to ap-I am perfectly clear that he has not such a point absolutely. right as he claims at present; for it is interrupting the freehold possession of the Chapter. This is not merely a nominal appointment; but the person elected is entitled to benefits which he is to receive out of the funds of the church. whatever right the Bishop, as visitor, may have to enforce a proper performance of the duties of the church, he cannot go further, and insist on filling up an office for life, like the present: This is exceeding the limits of the power to which he is entitled by his visitatorial authority.

Buller,

BULLER, J. As the church of Chichester has received the 1787. advice and assistance of this court on several occasions lately The Bishop it is rather unfortunate that they should not have settled that question. Many points have been decided by this court on great deliberation, which may perhaps go the length of de-HARWARD termining the present question. It has been resolved first that a mandamus will lie to compel the Dean and Chapter to fill up a vacancy among the canons residentiary; and on such a mandamus the court will compel an election at the peril of those who resist. 2dly, That the election is in the Dean and 3dly, That the Dean has no casting voice. 4thly, That the Canons have a right to vote by proxy. 5thly, That there is no lapse to the Bishop in the case of a canonry. R is now said, that the Bishop is not bound to apply to this court for a mandamus; I agree that he is not: but if he make such an application, I think we are bound to attend to him. and we will grant the writ: and I am not clear that a mandamus would not be granted on the application of any other person.

But the question here is, whether the Bishop can support the right on which the monition is founded. If not, the prohibition must be granted. This is not a mere spiritual office, but a freehold attended with temporal advantages; the persons electing to it being indeed all ecclesiastical persons. Whether the Bishop can compel them by ecclesiastical censures to do their duty, and to proceed to an election, is not now the question. If it were, I should require time to consider before I should negative such a power. We are now to decide whether the Bishop can take the right of election out of the hands of the Dean and Chapter, and admit Mr. Metcalf for that sun

absolutely; I am of opinion that he cannot do so.

It is no answer to this rule to say that this application was made too early; because the Bishop has exercised a right to which he has no title, and is now endeavouring to enforce it. Whether the Bishop could or could not have appointed a person, until a proper election was made by the Dean and Chapter, is another question, upon which I give no opinion; but as at present advised, I do not think that he could. At all event this prohibition must go.

GROSE, J. It is one question, whether or not the Blaken has any and what visitatorial power; and another, whether he has it to the extent now claimed. But it has not been sliews that he has this power. This may be compared to a case which frequently

frequently happens here, where this court has the power of compelling corporations to proceed to elections, which is in the nature of a visitatorial power, but they never assumed the The Bishop power of appointing any person themselves, in case the corporation did not proceed to elect. If the Bishop had applied for a mandamus, this court would immediately have granted HARWARD But he has no power to appoint to this office himself, inasmuch as it is a freehold, the right of election to which is in As to the other point I have great doubts, whether the Bishop could make a temporary appointment; at present, I think he could not.

1787. of CH1-CHESTES against & W 23-

Rule absolute.

## The KING against JACKSON and Another.

Friday April 27th.

MAMBRE shewed cause against a rule why an information Wherever should not go against the defendants, who where justices act uprightof the borough of Kendal in Westmoreland, for misbehaviour in ly though The offence with which they were charged, was they misthe having committed a pauper to prison "until he should take the "answer," whom they were examining relative to his settle-formation ment, for not answering a particular question propounded to will be him; under which commitment he continued in prison for granted as thirteen days; which it was contended by

Law was so manifestly illegal, that they must have known ther justices they were exceeding their authority; and therefore, that it of the peace must be intended that they acted from corrupt motives.

But it appearing, on reading the affidavits on both sides, that committing no corrupt motives were to be imputed to the defendants, the a pauper

rule was discharged. And,

Ashhurst, J. said, even supposing that the defendants questions have not, strictly speaking, acted legally, we will not grant an relative to information against them unless they have acted corruptly, his settle-When magistrates act uprightly and honestly, even though ment? they mistake the law, no information ought to be granted against them. I will not now decide whether magistrates have or have not a power to commit a pauper for refusing to answer proper questions put to him in the course of his examination. They certainly have a right to examine a pauper touching his settlement; and yet that would only be a shadow of a right, unless they had likewise a power of enforcing that Vol. I. Pppp examination.

Du. Whe-

for refusing

against TACKSON

examination, by committing the pauper for refusing to be examined. But without determining that question, and suppo-The King sing they have not that power, if these defendants acted without any corrupt motive, this court will not interfere by grantand Another, ing an information. Now no corrupt motive is expressly

charged by the affidavits, and we cannot infer it.

BULLER, J. The only ground upon which this information can be granted (if at all) is on the idea that the justices have acted corruptly; for, if they have not, however mistaken they may have been in their judgment, this court will not interfere in this manner. Now the affidavits on the part of the procution only charge the defendants with having acted illegally; from whence it is left to the court to infer corruption; which cannot be done.

As to the power of commitment, I do not know how justices are to act, unless they have such a power. mitment, "until he should answer," I think is right. though the pauper continued in prison under the commitment for thirteen days, that will not make the case stronger against the defendants. The party committed for refusing to be examined is to clear himself, and when he will answer, he must give notice to the magistrates. This is like the case of a commitment by the commissioners of a bankrupt, where the party committed must send word when he will submit and answer the questions.

GROSE, I. declared himself of the same opinion.

Rule discharged (a).

(a) Vide Carth. 152, 291.

Saturday. April 28th.

## SMITH against CHESTER.

In an action TNDORSEE of a bill of exchange against the acceptor. It against the acceptor of A appeared at the trial, before Buller, J. at the last sittings a bill of ex. at Westminster, that when the bill was accepted there were sechange, it is veral indorsements on it. But the plaintiff, not being able to necess iry to prove the hand-writing of the first indorser, was nonsuited. or ve the Bower now moved to set aside this nonsuit on the ground ի ınd-wrimag of the that as these indorsements were on the bill at the time of the first indoracceptance, they must be taken to have been admitted by the ser, notdrawee, and he could not afterwards dispute them; and he withstandcited in support of this a determination of Lord Mansfield's ing such indorsement in the case of Pratt against Howison, at the sittings after was in the Trin. term, 23 G. 3. at Guildhall, and another case in Sayer bill at the t.ei: was accepted.

223.

223. observing that there would be great hardship in the case of foreign bills of exchange in many instances, on account of the difficulty and inconvenience of proving the hand-writing of the first indorser, who may be unknown to the holder.

SMITH against CHESTER.

Ashhurst, J. The law has been otherwise settled. And if it were not so, there would be no difference in this respect between bills payable to order, and those payable to bearer.

And it would open a door to great fraud.

BULLER, J. This point was much considered in a late case before this court, when they were perfectly clear that an indorsee of a bill of exchange, in an action against the acceptor, was obliged to prove the hand-writing of the first indorser. For when a bill is presented for acceptance, the acceptor only looks to the hand-writing of the drawer, which he is afterwards precluded from disputing; and it is on that account that an acceptor is liable, even though the bill be forged.

GROSE, J. This matter appears extremely clear; for a bill of exchange is no payment to the person in whose favour it is

drawn, unless it is indorsed by him.

Rule refused (a).

(a) Vide Tutlock v. Harris, post. 3 vol. 174; Vere v. Lewis, ib. 182; & Mine. v. Gibson, ib. 481; & 1 H. Bl. Rep. C. B. 569.

## COTTERILL against TOLLY.

Saturday, April 28th.

N an action of assault and battery, wherein the declaration, There shall. A after stating the assault, stated in the same count, that the pe no more A after stating the assault, stated in the same count, that the costs than defendant then and there tore, rent, &c. the clothes of the damages in plaintiff, the jury found a verdict for the plaintiff with one trespass for shilling damages; and they also found upon being asked by an assault, Grose Justice, that the clothes were torn in consequence of the battery, and beating. It was moved by Lane that the master might tax plaintiff, the plaintiff his costs; and he stated the distinction to be this, clothes, if the that wherever the tearing was laid as a consequence of the jury find beating (a), the plaintiff was entitled to no more costs than that the tearing was damages upon a verdict for less than 40s: But where, as in in consethis case, it was laid as a substantive allegation (b), the plain-quence of the tiff was entitled to his full costs upon a general verdict, though beating, and he did not recover 40s. He admitted that in Clegg and Mo-than 40s. lineux (c), which was an action of trespass for breaking a damages. close, digging turf, &c. and taking and carrying away the same, the court had determined that the asportavit was merely

(a) Hanson v. Adebead, Bull. N. P. 329. (b) Harnes, 120. 134. (c) Doug 4.750.

Cotteartl against Tolly. merely a mode or qualification of the injury done to the land, and that it was part of the trespass: but they said, that it was distinguishable from an asportative of personal property: as, for instance carrying away trees after they were severed from the freehold. In the present case, the trespass must be considered as a substantive charge, because it was so laid; and the finding of the jury did not vary the case, because they had no right to find the fact in a different manner from that in which it was laid; and if they had intended to acquit the defendant of that part of the charge, they should have found him not guilty as to that part.

ASHHURAT, J. The rule is, that wherever the tearing of the plaintiff's clothes is merely consequential to the beating, the plaintiff is not entitled to more costs than damages, unless the jury find to the amount of 40s. damages. Now here it is expressly found that the tearing was in consequence of the beating; therefore the plaintiff is not entitled to his costs.

BULLER, J. The declaration in this case is sufficient to carry the costs, because the tearing, &c. is laid as a substantive fact. But the plaintiff must recover secundum allegates probates. If the jury had found the truth of the allegation, the plaintiff would have been entitled to his full costs: but they have negatived that part of the count, because they have found the tearing to have been in consequence of the beating, and the court are bound by that finding; though it would have been more correct if they had found the defendant not guilty as to that part.

GROSE, J. I left it to the jury to consider whether the tearing was in consequence of the beating, who found that it was. It was then left to the defendant's counsel to indore the postea in such a manner as to exclude the plaintiff from having his costs.

Rule refused,

Sanurday, April 28th.

### GREEN against RENNET.

In an action against the defendant for negligence as an state defendant for negligence, the declaration stated that the plaintiff's intestate had retained the defendant to prosecute one John Shuling for sence as an state of the defendant to prosecute one John Shuling for sence as an state of the defendant to prosecute one John Shuling for sence as an state of the defendant that the defendant had promised disjunction of the defendant had promised disjunction of the defendant to prosecute the said suit, &c. It then stated that the defendant had promised disjunction of the defendant to prosecute one John Shuling for sentences as an state of the defendant to prosecute one John Shuling for sentences as an state of the defendant to prosecute one John Shuling for sentences as an state of the defendant to prosecute one John Shuling for sentences as an state of the defendant to prosecute one John Shuling for sentences as an state of the defendant to prosecute one John Shuling for sentences as an state of the defendant to prosecute one John Shuling for sentences as an state of the defendant to prosecute one John Shuling for sentences as an state of the defendant to prosecute one John Shuling for sentences as an state of the defendant to prosecute one John Shuling for sentences as an state of the defendant to prosecute one John Shuling for sentences as an state of the defendant to prosecute one John Shuling for sentences as an state of the defendant to prosecute one John Shuling for sentences as an state of the defendant to prosecute one John Shuling for sentences as an state of the defendant to prosecute one John Shuling for sentences as an state of the defendant to prosecute one John Shuling for sentences as an state of the defendant to prosecute one John Shuling for sentences as an state of the defendant to prosecute one John Shuling for sentences as an state of the defendant to prosecute one John Shuling for sentences as an state of the defendant to prosecute one John Shuling for sentences as an state of the defendant

debter of
the plaintiff's to judgment, the return of the writ on which the debter was arrested being laid
to be in the 25th year, &c. and the writ itself appearing to have been returnable in the 26th
year, &c this was held to be a fatal variance; even though the day of the return was alleged
the declaration under a videlicet.

fterwards, to wit, on the 24th of Yanuary 1785, the defend-ent sued and prosecuted a bill of Middlesex, returnable on Monday next after fifteen days of St. Hilary, and delivered it to the sheriff, who made his precept, under which Shultze was Ramnert.

pressed, and detained by him, till the said Shultze afterwards and before the return of the said precept, to wit, on \$1st of January in the year aforesaid, was in due manner committed to the custody of the marshal, &c. That though the said defendant, whilst the said Shultze was in custody, &c. to wit, in Easter term in the year aforesaid, might and ought to have obtained and signed a judgment against the said Shultze for the said debt, yet the defendant well knowing, &c. did not truly and diligently prosecute the said suit, &c. and did not then, or at any time whatsoever, obtain or sign any such judgment therein; by reason whereof the said Shultze afterwards, to wit, on the 4th of November 1785, was in due manner superseded and discharged, the said debt being wholly due and unpaid.

The writ was in fact sued out on the 24th of Yanuary 1785. but by a mistake it was indorsed on the 24th of January 1784. At the trial of this cause before Buller, J. at the last sittings at Westminster, on the production of the writ, it was objected that there was a material variance between the writ and the declaration, the writ itself appearing on the face of it to have been sued out in January 1784, but that was over-ruled: but the learned judge, being of opinion that the return of the writ was material, and there being a similar variance in that re-

spect, nonsuited the plaintiff.

Gibbs now moved to set aside this nonsuit, contending, that as this was an action against the defendant for negligence in not prosecuting a person to judgment, it was equally immaterial when the writ was returnable, as when it was sued That the damage to the plaintiff, which was the gist of the action, was precisely the same, at whatever time it was returnable. Supposing the defendant had sued out a void writ, the action would have lain; therefore, if it be immaterial whether the writ be good or not, the return of it must be equally so. At all events, it may be rejected as coming under a videlicet. He then cited a case of Nichols qui tam, v. Bamfylde, at Bodmin Summ. Ass. 1784, before Hotham, Baron. which was an action of debt on the stat. 5 W. & M. c. 20. s. 48. against an excise officer for soliciting a vote at Mitchel for the late election. The declaration stated the writ and delivery to the sheriff; and that he afterwards, and before the

1787. <u>\_</u> GREEN against

return thereof, to wit, on the 4th of April, made his precept in writing. The evidence was of a precept dated 1st of April. Grose objected to it as a variance, with which Baron Hothers concurred and non-suited the plaintiff. A motion was made RENNETT. the ensuing term in the Court of Common Pleas to set aside the nonsuit and grant a new trial, which was accordingly granted, that court entertaining no doubt on the question.

But in this case The Court were all of opinion that, the time when the defendant ought to have charged Schultze in execution depending on the return of the writ, the return became

material, and therefore the variance was fatal.

Rule refused (a).

(a) Vide post. 782.

Seturday. April, 28th.

# HOLLIDAY against CAMSELL and WHITE.

A member of an amicable society intrusted with a box containing the fund. and bound by band to keep it eafely, can TOVET ther member and a third person, who take it from him.

IN this action of trover, which was brought to recover a L box of money, Heath, J. before whom it was tried at the last assizes at Nottingham, nonsuited the plaintiff, on the ground that one tenant in common could not maintain an action of trover against another. The circumstances were The plaintiff and defendant Camsell were members of a friendly society, which was instituted for the purpose of relieving each other in case of sickness or other disability. net maintain The fund for this purpose was levied by weekly contributions from each of the members; and the aggregate sum was against ano-kept in a box which was deposited in the plaintiff's house, who was an innkeeper; and a bond was given by him for the safe custody of it, Camsell got possession of this box, carried it away, and delivered it to the other defendant White, who was not a member of the society.

Gally moved to set aside this nonsuit, and contended that the plaintiff had a special property in the box, exclusive of any right which the defendant had in it; for the box with its contents was lodged in the plaintiff's hands by the club, and he had given security for the safe custody of it. But the defendant had no other interest than a mere contingency in the event of the sickness, and then only in a certain proportion. No person therefore had any right as against this plaintiff, but the majority of the club, by whom alone he can be released from his obligation. Besides the rule of law, that one tenant in common cannot maintain an action of trover against another, does not apply in cases where the possession

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of that other is tortious. And here the defendant has no right whatever to keep possession of the box against the con-

sent of the plaintiff.

Ashhurst, J. The rule of law is undoubtedly true, and applies to this case. All the members of this society have a joint property in the box and its contents; they are therefore WHITE tenants in common, and one tenant in common cannot maintain trover against another.

BULLER, J. It is here admitted that one of the defendants was a member of this society, and consequently had a general property in the box; at any rate therefore a special property cannot give a right in this action against a general property. The custody only is committed to the plaintiff, the property remains in the society.

GROSE. I. of the same opinion.

Rule refused.

# MOORE and Others against WILSON.

Monday. April 30th

ASSUMPSIT against a common carrier for not safely car- In an action rying and delivering goods sent by the plaintiffs. The by the coadeclaration stated, that the defendant undertook to carry the goods goods "for a certain hire and reward to be paid by the plain- against a "tiffs." It was proved at the trial that Clarke, the consignee, carrier for had agreed with the plaintiffs to pay the carriage of the goods, non-delivewhich the defendant's counsel contended did not prove the the plaintiff declaration. And

BULLER, J. before whom the cause was tried at Guildhall, the defend-

being of that opinion, nonsuited the plaintiffs.

Law had obtained a rule on a former day to shew cause ver, &c. in why the nonsuit should not be set aside on the ground that the consideraallegation that the hire was to be paid by the plaintiffs, was bire to be paid immaterial; and that in all cases of this kind the contract was by the plainvirtually made between the carrier and the sender of the tiff, proof goods. That no private agreement between the consignor that the hire and the consignee could vary the question as between the con-paid by the signor and the carrier. That though the consignor might consignee have parted with the property in the goods, he might main-was held to tain an action against the carrier. Davis and Jordan v. beno vari-James, 5 Burr. 2680. Vale v. Bayle, Cowp. 294. But at all consignor events, the consignor might be considered as the agent of the being by law consignee for the purpose of bringing this action.

BULLER, J. on this day said, that on considering the question he found he had been mistaken in point of law; for that whatever might be the contract between the vendor and the vendee, the agreement for the carriage was between the carrier'

averred that took to deli-

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carrier and the vendor, the latter of whom was by law liable And the other two judges being of the same opinion, the rule was made absolute without farther argument.

Rule absolute (a).

(a) Vide 1 Att. 248.

Tuesday. May 1st.

# LORD PELHAM against PICKERSGILL.

If a person, claiming & highway, can shew that the liberty of ry in the originally granted to the public in consideration of the tolls; and such original grant is a good consupport the

demand.

ASSUMPSIT for tolls. Plea the general issue. This casue was tried at the last summer assizes at York, ton for pass. before Buller, J. when the jury found a special verdict. in substance as follows: That the manor of Bure in the country of York, in the declaration mentioned, is a manor of the ancient demesne of the passing over crown of England, as by the book of Doomsday, to the jurors the soil, and aforesaid produced and shewn in evidence, appears.

the taking of William the First, heretofore king of England, was seised of toll for such passage, are the said manor of Bure, and of the grounds and soil thereof of both imme- which the borough of Boroughbridge in the within mentioned morial, and declaration was part and parcel, in his demesne as of fee, is that the soil right of the crown of England. That the said manor, and the were before ground and soil thereof, were and continued to be the inheri-the time of tance and parcel of the possessions of the crown of England, legal meme- and of the duchy of Lancaster respectively, from the reign of same hands, king William the First until the time of the alienation of the though seve-said manor from the duchy in the reign of king Cherles red since, it the First, as hereinafter mentioned. That all and singular the shall be pre- kings and queens of this realm, in right of the said crown of the soil was England, and duchy of Lancaster respectively, for the timebeing, from time whereof the memory of man is not to the contrary, have in respect of such manor by their respective bailifs and farmers for the time being had, taken and received, and have been used, &c. to take, &c. at the bridge of the Borough, otherwise Boroughbridge, within the said manor, a certain reasonable toll, that is to say, a toll of 4d. for every wains or waggon loaden, coming, going, or passing that way, over sideration to the said manor, for and in consideration of such liberty of passage with such waine or waggon loaden over the said manor. That the office of receiving the said tolls within the said manor by the respective bailiffs and farmers of the said kings and queens of this realm for the time being, long before, and at the time of the making of the grant and demise hereafter mentioned, have been, and was, called, known and distinguished by the name of the bailiwick of the borough of Boroughbridge,

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in the county of York. And that the said bailiwick and the said tolls, long before the making of the grant and demise hereafter mentioned, had been annexed to, and then were par. Lord PELcel of, the possessions of the ancient duchy of Lancaster. The verdict then stated a grant by king William the Third, in the PICKERS year 1697, of the bailiwick and the tolls to Sir Robert Howard. and deduced a title to the plaintiff. That by virtue of the premises the plaintiff became, and was, and still is, possessed of the said bailiwick of the borough of Boroughbridge, in the county of York, and the said tolls there, and all and singular the rights, members, and appurtenances thereunto belonging; and being so possessed thereof, the defendant afterwards, to wit, on the first day of January 1780, and on divers others days and times between that day and the first day of May 1785, came, went, and passed with three waines or waggons loaden over the said manor, by and at the bridge of the Borough, otherwise Boroughbridge aforesaid. That, from time whereof the memory of man is not to the contrary, there hath been and is a common public king's highway through and over the said manor, and over and along the said bridge of Boroughbridge, within the said manor, where the defendant passed with his said waines loaden as aforesaid, and for which passage the said tolls are claimed to be due to the said plaintiff, used for all the king's subjects to go, return, pass, and repass, on foot and on horseback, and with their cattle, carts, and carriages, every year, at all times of the year. And that, from time whereof the memory of man is not to the contrary, the inhabitants of the West and North Ridings of the county of York have been used and accustomed to repair, maintain, and amend, and still do repair, maintain, and amend, and of right ought to repair, &c. the said bridge of Boroughbridge, when and so often as may be necessary, in certain proportions. That Charles the First, late king of England, severed the said tols from the said manor, and reserved such tolls, and alienated the said mamor of Bure to several citizens of the city of London, whose sepresentatives are now the owners thereof. But whether the defendant became liable to pay to the plaintiff, as and for the tolls due and payable to the plaintiff for the passage of such three waines or waggons loaden, the sum of one shilling, being four-pence a time for each and every time of the defendant's coming, going, and passing, with his said waines or waggons louden over the said manor, the said jurors know not, &c.

Qqqq

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This verdict was argued in last Michaelmas term, by Cockell for the plaintiff, and Chambre for the defendant; and again, on Lord PEL. this day, by Wood for the plaintiff, and Law for the defendant,

Wood for the plaintiff, after observing that there were two kinds of tolls, namely, toll-traverse, and toll-thorough, conteaded that this was a toll-traverse; for it is taken in consideration of passing over the soil of another. If a person has dedicated his land to the public service, that is a sufficient consideration for this kind of toll. But a toll-thorough is taken for passing over an highway, where the owner of the toll claims nothing in the soil; and that sort of toll cannot be supported, unless something be done by the owner of the toll, such as repairing the road or bridge, &c. In Fitzherbert (a) a definition is given of the two kinds of toll; it is there said, that " toll-" traverse lies in prescription, but not toll-thorough, for it is " an oppression of the people;" 22 Ass. 58. It is also said, "that toll-traverse may be by prescription or grant; but toll-"thorough cannot be by either grant or prescription;" 20 E.S. It appears therefore from this passage that toll-thorough cannot be supported unless some consideration be shewn; and when it speaks of toll-traverse by prescription or grant, it means that a person may prescribe for taking a toll for passing over his land without any other consideration. All tolls may possibly have originated from the king's grant; and formerly the king might have granted a toll to be taken in an ancient highway, provided a consideration was imposed upon the grantee for the benefit of the public; and that is what is understood by a toll-thorough. In Heddy v. Wheelhouse (b), where the question was relative to taking a toll in a fair, it is said, that "the king may grant a fair, and that a toll shall be " paid, though it be a charge on the subject, because the sub-" jects have ease and benefit by such fairs." The same doctrine is recognized in Smith v. Shepherd (c); where it is said, that "the queen may at this day grant such a toll, if something " be done for the benefit and ease of the people." If then the king for a reasonable consideration may grant a toll for passing over an highway, it follows that he may grant a toll to a subject, in consideration of his dedicating his land for the purpose of an highway.

It is stated on this record, that the highway and the toll are co-eval, so that the granting of the highway was the considera-

(a) J. N. B. 518. n. (b) Gro. Eliz. 558. (c) Cro. Eliz. 710:

tion of the toll. And this is surely as good a consideration as the repairing of the highway. If this were not an highway for all purposes, it could not be contended that this toll could Lord PEL-not be taken. Then if a person, who dedicates his land to the public for particular purposes, be allowed to make a demand of this nature, a fortiori shall he who dedicates his land for all purposes, inasmuch as the consideration is more meritorious. In order to support this toll, it is only necessary for the plaintiff to shew something from whence some consideration may be inferred. Now, here it is stated, that the manor and the soil thereof continued in the possession of the crown of England till the reign of Charles the First, when the tolls were first severed from the manor, and that the toll claimed has been immemorially paid for and in consideration of the liberty of passing that way over the said manor; from whence it may be strongly inferred that the grant of the highway was the consideration of the toll. If this were not so, toll-traverse could never exist; because, if the road be once given up to the public, there is nothing farther to be done by the person so giving it up. And the instant the grant of the highway is lost in antiquity, the evidence of the consideration of the toll would be lost with it, as there cannot be a continuation of such a consideration. He then cited several authorities to shew what had been considered as toll-traverse, and that this was such. It is a good prescription to have a halfpenny of every one who goes over his land. Bro. Abr. Prescription. pl. 57. Crispe v. Belwood (a) was, where toll was claimed for landing goods within the manor of A in consideration of repairing a wharf within the manor, without saying that they were landed upon the wharf; which, after considering the cases, was allowed to be good. In the case of James and Johnson (b), a toll was claimed by the lord of the manor of B. as appurtenant to the manor, for all beasts driven over it : there Maynard, Serjeant, argued (inter alia) that a toll-thorough may be by prescription, without any reasonable cause alleged of its commencement; for having been paid time out of mind, the true cause of its beginning in the intendment of the law cannot be known. And the Court, agreeing with his argument, gave judgment in favour of the toll. In Smith v. Shepherd (c), the question was, whether a lord of the manor of Berkley could claim a toll by prescription for the sheep of strangers passing through the vill? Popham, Ch. J. said,

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(a) 3 Lev. 424.

(b) 1 Mod. 231.

(c) Cro. Eliz. 710.

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" one may have toll-traverse by prescription, and so he may have toll-thorough, but it ought to be for some reasonable Lord Pri- cause which must be shewn. And, because no cause was alleged by which it might appear to the court to have a lawful commencement, he conceived the plea to be ill. Gauchy and Clinch, Justices, held the plea to be well enough; for being by prescription, the cause thereof cannot by intendment be known: but in respect it might have a lawful beginning, it is well enough without shewing it." But, for the default in pleading, judgment was given against the toll. Now sufficient matter appears upon this special verdict, from which the Court may reasonably infer that the toll had a legal commence-In the case of the Mayor, &c. of Tarmouth against Eaton (a), where the question was, whether the corporation could claim port duties without setting forth any consideration on which the prescription was founded? Lord Mansfield said, " the making a port is itself a consideration, it may acver require repair; therefore I do not know that it is necessary to shew repair." Dennison, J. said, "it is necessary to shew that the corporation are owners of the soil, or repair the port; and that it was not like the case of toll-thorough." Wil mot, J. remembered the case of the Mayor of Nottingham w. Lambert, and observed, that though it was said there, "that the plaintiffs could not have recovered, for want of shewing that the corporation were lords of the manor, yet it could not alter the judgment in that case. The crown has a right to create the duty, and to grant the duty to another." Here that which was required in that case is expressly shewn; for a appears to have been the soil of the crown over which the highway passes. The case (b) which was lately determined relative to this right, was different from the present; for it was not there stated that the crown was owner of the soil: so that there appeared to be no consideration for the toll.

Law, for the defendant, made two questions: first, Who ther upon the facts found by this special verdict, the toll in question is a toll-traverse or a toll-thorough? And, adly, H it he a toll-thorough, Whether the claim to it can be sustained without shewing an original consideration for the commencement of it, such as the making or repairing the road in ques-

tion, &c.

As to the first, it is stated to be a toll of 4d. taken for every waine or waggon passing that way over the manor, in cousideration of such liberty of passing; but it is further stated,

(a) 3 Burr. 1402.

(b) Ld. Pelham v. Haigne, C. R.

at there has been immemorially a common public king's whway through and over the said manor, and over and along bridge, &c.; and that the bridge has been immemorially Lord Palpaired by the inhabitants of the West and North Ridings of > rkshire; so that the existence of a toll-traverse is expressmegatived by the jury. A toll-traverse is expressly defined be "a payment of a sum of mone for passing over the pri-Le soil of another (a):" or in a way not being an high street ). This is laid down by Thorp, [. (c) who said, "that tolltraverse is properly where a man passes over another's soil in the way not being an high street." If this definition be curate, in order to support this claim the owners of the toll rust have once been owners of the soil, and at a time too hen there was no highway over it; but the latter part is exressly negatived by the finding "that the highway is imme-It is laid down in the case of Smith and Shepherd d). and recognised in Trueman and Walgham (e), that the ineritance of every man in the king's highway is prior to all precriptions; now the existence of this toll must necessarily be osterior (f) to the time when the place in question had ceasd to be the private soil of another; it consequently then becan to exist at a time when all legal consideration for its exstence had become impossible. But even if the tall and highway began together, that will not answer the plaintiff's purrose; for it is incumbent on the plaintiff to shew, that those from whom he claims had the soil before the toll began, and that they relinquished it in consideration of the toll. argument that the toll may be now presumed to have had a legal commencement, were to prevail, all other exactions, of which the commencement is unknown, may be equally supported. But it has been determined in a variety of cases that immemorial payment is not sufficient to support a demand by prescription, if it could not have had a legal origin; as in Prideaux and Ward (g). Otherwise it would be to establish that every ancient payment carried in itself the evidence of its own legality. This cannot be considered as a toll-traverse, because that is, strictly speaking, a toll for passing over the soil This is established by those cases (h) where it has been determined that toll paid for passing over the manor of another is toll-traverse; for the manor in such cases is

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<sup>(</sup>a) Sid. 454. (5) 2 Roll. Abr. Title Toll, 522. Bro. Abr. Tit. Toll, pl. 6. (c) (e) 2 Wils. 296. (f) Vide Lovelace's case, Salk. (b) Prideaux v. Ward, 2 Lev. 96. Crispe and Bell. (d) Mo. 574. (g) 2 Lev. 96. wood, 3 Lev. 424.

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equal to the soil, the whole right of the soil having at our time been vested in the lord of the manor. If such a toll could Lord Par- commence at any subsequent time, it might legally commence now; and if all the tenants consented, it would still be a toltraverse, inasmuch as it would be ratione soli. The case chiefly relied on by the plaintiff is that of James v. Johnson, as reported in 1 Mod. 231, where Serjeant Maynard is made to say, that there is no difference between a toll-traverse and a toll-thorough; and that a toll-thorough may exist without any consideration. But that was not the question then before the Court; and the "cur. accord." does not relate to that part of his argument, but to the last proposition, which was the real point in the cause, namely, that a thing that lies in grant cannot be claimed by a que estate directly by itself, but it may be claimed as appurtenant to a manor by a que estate in the manor. Besides, that case is differently reported in 2 Med. 144, where Serjeant Maynard argued directly the reverse. and the court were clearly of opinion, " that if the defendant " had said this was toll for passing the highway, he must have "shewn some cause to entitle himself to the taking of it, as "by doing something of public advantage." The case of Smith v. Shepherd (a) was precisely similar to the present; it was a claim of a toll for passing over an highway for which no consideration was shewn. There Popham, Ch. J. was of opinion that a consideration must be shewn; Gaudy, J. doubted; Fenner, J. delivered no opinion; and Clinch, J. was of opinion that it might be presumed to have had a legal beginning: but in another report of this case (b), the Court are made to adjudge that the toll could not be supported, and a reason given is, because "a person's inheritance in the queen's "highway is precedent to all prescriptions." From a consideration of all these cases it appears that toll-traverse may be claimed for passing over the soil or manor of another, but not for passing over an high-way.

Secondly, a toll-thorough cannot be claimed without shewing a consideration for it. 22 Ass. pl. 58. 2 Ro. Abr. Titk Toll. and 3 Bro. Abr. Title Toll. In Keilway 148. it is said, that a man shall not have a toll-thorough for passing over an highway, because it is common to all. And this is not inconsistent with another decision in the same book; for that was the case of a toll-traverse, which is not disputed. What is thrown out by the Court in 35 H. 6. p. 29. 13 H. 4. p. 14. and 5 H. 7. p. 10. cannot be considered as decisive, because

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ather of those questions called for any decision upon this int. It is true that Lord Hale (a) intimates a doubt whether Li-thorough cannot be claimed without a consideration; but Lord Pare result of his opinion, after considering the authorities, ems to be that it cannot. The cases of The King v. The Cor. ration of Boston (b), Hasport v. Wills (c), The Corporation of and Hunt (d), Warrington v. Moseley (e), The Mayor

Yarmouth v. Eaton (f), Wilkes v. Kirby (g), and Trueman Walgham and another (h), all establish the point, that there ust be a consideration for toll-thorough. And indeed this nestion has already received a decision by the Court of Comon Pleas, upon the same right as the subject of this action, ad between one of the present parties (i); though two strong dictional facts are stated on this verdict, which did not apear in that case, namely, that this is an immemorial highway, nd that the bridge has been immemorially repaired by the Jorth and West Ridings of Yorkshire; still the court deter-

nined in that instance against the toll.

ASHHURST, J. It is properly admitted that toll-thorough annot be supported without shewing a consideration; but oll-traverse may; and the reason is, that the very circumtance of passing over the soil of a private person, where the public had no right before to pass, imports a consideration. At the same time, if this were a new case, we should enquire nto the reason of this distinction; because in every case which requires a consideration, it ought, from length of usage, to be presumed. For the rule with regard to prescriptions is, that every prescription is good, if by any possibility it can be That is the supposed to have had a legal commencement. general rule; and I cannot see why a good consideration for toll-thorough cannot be presumed as well as for toll-traverse; because the giving of the soil to the public is in itself a good consideration. But in all probability the distinction arose from the difficulty in most cases of shewing that the toll and the ownership of the soil were co-eval. For there are very few cases where it could possibly be shewn that the soil over which an ancient road passes was the soil of a private person. But in the present case it is shewn, and that distinguishes it from all the former determinations. It is unnecessary to go through all the cases upon this subject; because though tollthorough

rent. 71. (d) 3 Lev. 47. (e) 4 27. (g) 2 Luty. 1519. (b) 69 5 Lev. 47. (c) 4. Mod. 319. (f) 3 Burn 146. (b) 2 Wile, 298. (i) Ld 2... (f) 3 Burr. 1402.

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1787, thorough cannot be claimed without a consideration, yet the answer to it in the present case is, that it is expressly found Lord Par- that before the time of legal memory the property of the soil was in the crown. For it is stated as the first fact here, that William the Conqueror was seised of the manor of Bure and the ground and soil thereof, and that it continued in the crown till the reign of Charles I. by whom the tolls were severed from the manor. Why then is this not as good a consideration as the repairing of a bridge, or the walls of a town, or any other meritorious service, which are at this day acknowledged in law to be a good consideration for claiming a toll-thorough? Therefore, in the present case toll-thorough and tolltraverse are the same thing. The only reason why a distinc. tion is in general taken between them is, because in the former it cannot be shewn that the road was originally the soil of a private person. Where there was an ancient highway, the king could not grant a toll-thorough unless something were w be performed for the benefit of the public by the grantee, such as repairing the road, or the like. But that was not necessary here, for this toll was originally claimed by the crown itself, and therefore it could not commence by a grant to itself. The toll must be now presumed to be co-eval with the right of passage. The crown had a right to say to the public, that they should not use this ground for the purposes of an highway without paying a toll for it. That toll has been paid ever since, and therefore a good consideration may be supposed. The case here stated is extremely different from that on which the Court of Common Pleas gave their opinion: se that this decision will not impeach the judgment given by that Court on the case before them; for if the same facts which appear on this record had been there stated to them, they would perhaps have made a different determination.

BULLER, J. The first question to be considered is, what are the material facts on which our opinion is to be given. The facts are disclosed at large by the special verdict, but in substance are only these; that the subjects of this country have immemorially had a right of passing over the way in question. paying a toll of 4d. for every waggon to the owner of the soil. Considering the case in that light, the question is who ther on this finding the Court can say that the subjects have a general and unqualified right of way; if they do, it will be directly contrary to the finding of the jury; for they have found that there is no right of way but on paying the toll. I agree

I agree that where the subjects have a right of way it is not in the power of the crown to throw a charge upon them without some consideration. The ground on which that doctrine Lord Para founded is that there must be a quid pro quo. If the sub- " BAM ects ever had a right of way without paying a toll, there is Pickers 10 quid pro quo. But in order to apply that argument a case must be shewn that the subjects had a right of passage before he granting of the soil, which is contrary to this case. has been argued by the defendant's counsel that it is incument on the plaintiff to shew that he was in possession of the soil over which the road passes before the toll existed; but I think that the defendant must shew that the subjects had a right of way prior to the claim of the toll. But on this verlict they are stated to be co-eval; therefore the subjects never had a right of passage without paying this toll. loes this toll appear on the verdict to be illegal and void?— The consideration stated is, that the toll was always payable to the owner of the soil. The next point to be considered is whether this is toll-traverse or toll-thorough. The cases nost applicable to this subject are, 5 Hen. 7. fo. 10. a. Keihw. 152. Smith v. Shepherd (a), and Truman v. Walgham (b). he first of these, Fairfax, J. said, " it is a good prescription for any one to take a penny of every person for passing over his land; and this is toll-traverse; it is good, because each has a quid pro quo, and so of toll-thorough, where a man pays toll in a vill." The comment made by the defendant's counsel upon this passage is, "so of toll-thorough where here is a consideration." But what is the consideration?-' So" must refer to what goes before, and no other consideraion is shewn but that of passing over the land of another. This may have been one of the cases which occasioned Sereast Maynard to say that the cases were confounded (c). But that authority, as far as it goes, speaks of the consideraion being good, if it be for passing over the lands of anoher; that is the case here. Next as to the case in Keihvay d); there the claim, which was of a toll for passing over the lemesnes of the manor, was established; there was no other consideration. And whether it were claimed as appendant o the manor, or as an easement, is immaterial to this case, or this prescription was allowed. That case, in my opinion, applies strongly to the present. Then as to the case of Smith . Shepherd, Mo. 574, which is likewise reported in Gro. Eliz. Rrrr 710; Vol. I.

<sup>(</sup>b) 2 Wile, 292. (a) Moor 574. (c) Vide 8 Co. 46. b. (d) 152.

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710; there toll was claimed for sheep passing through a vill: but it was not stated that the party claiming it was seised of Lord PEL- the soil. The court in that case said, " that the inheritance " of every man in the king's highway is prior to all prescrip-"tions." That goes decidedly on the ground that the party was not entitled to the soil; and that the subjects had a right of passing over the road before the toll was claimed; otherwise the word "inheritance" is not capable of being explain-To create a toll, therefore, in such a case, would be to deprive the subjects of their right: but if the right did not exist, the subjects could not be deprived of it. And when the case proceeds to state that if the party shew a consideration, "as repairing a road or a bridge;" those instances are only put by way of examples, and do not exclude any other consideration. If what was said by the court there, "that toll-"traverse may be prescribed for, because it is for passing over a man's freehold," was said with a reference to the case then before the Court, it is a strong confirmation of the other authorities. For it shews that though a toll cannot be claimed for passing through a vill, yet if it befor passing over a man's own soil, it is a good consideration. It seems to me from the passage in 1 Mod. 105. that the Court merely referred to cases where the party was not in possession of the soil over which the highway passed before it became a highway; for one of the cases there put by Lord Hale was that of a toll upon the sea; so that it is plain, that he meant to put cases where the toll was claimed in places where the subjects had before a right of passage. The last case was that of Trumon v. Walgham; there Lord Camden made a distinction between a toll claimed for passing over the soil of the party or not. He said, "the defendant would have us believe it is for pas-" sing through his own manor or land;" which shews that if it had been for passing over his own manor or land, the Court would have held it a good consideration. These cases apply very strongly to shew that this is a toll-traverse, in which it is admitted that no consideration need be shewn. The 22 Ass. pl. 58. has been much relied on: but in that case, nothing was said with respect to the soil. And it is clear, that the court went on the idea that the party claiming the toll had no interest in the soil, and that there was a general right of passage before the toll was claimed. For the complaint was that the toll was outrageous; and it was only claimed as a toll-thorough. Thorpe J. there said that toll-thorough was an oppression

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againet

on the people, and that it was against common right: but tollraverse was where a man passes over the soil of another in a way, not being an high street. From that case it is manifest Lord Palhat Thorpe was speaking of an highway of which the public and possession before the toll was granted; if so, the crown Pickage could not charge the public with the burthen. The note in F. N. B. 518. n. c shews that this must be the meaning of the old cases. But that is not the present case; for originally the public had not this right of way. And if there were a contract between the crown and the public, that the latter should have the use of the road on paying the toll, the reservation is a sufficient consideration. Here the jury have expressly found that the toll was paid in respect of the soil; which I think a sufficient consideration.

GROSE, J. The only case which induced me to entertain a doubt from the beginning was that in 22 Ass. pl. 58. But that has been fully explained by my brother Buller. Then is this a toll-traverse? I think it is. It appears that the use of the road has been immemorial; and that the payment of the toll has likewise been immemorial; from whence it was contended by the defendant that the road has been used as long as the toll has been claimed. But I intend, what may fairly be intended, that the commencement of the toll was legal, and that the payment was made in consideration of the use of the They both began at the same time. If the toll were given for the use of the soil, it was a sufficient consideration. As this question, and all the cases cited, have been so fully gone into by the rest of the Court, it is unnecessary to repeat the same observations: but I agree entirely with every part of the judgment delivered by the Court.

Judgment for the plaintiff.

# LLOYD against TOMKIES.

Tuesday. May 1st.

CTION of covenant. The declaration stated that the If a leason defendant, by an indenture dated 24th May 1771, grant-covenant ed to the plaintiff in fee a certain messuage, &c. with the ap-joyment purtenances in Oswestry, Salop; and also all other the mes- against the suages, &c. of the defendant in Oswestry, together with all lawful let, and suit, entry,

beirs and assigns; the declaration for a breach of the covenant need not expressly allege that he entered claiming title, if the disturbance complained of be such as clearly appears to be an assertion of right.

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LL PYD

against

Tomkies.

and singular out-houses, commons, profits, privileges, commodities, emoluments, advantages, hereditaments, and appurtenances, whatsoever, to the said premises belonging, &c. and all the estate, &c. That the defendant, by that indenture covenanted (inter alia) with the plaintiff, "that the plaintiff, his "heirs and assigns, should or might, from time to time, and " at all times thereafter, for ever peaceably und quietly have, hold, use, occupy, possess, and enjoy, all and singular the " said premises thereby granted, with their appurtenances, " without the lawful let, suit, entry, eviction, or interruption of " the defendant, his heirs, executors, administrators, or as-" signs, or any other person or persons claimed by, from, or " under him, them, or any of them, or his, or their, or any of "their ancestors." The breach stated was, that the plaintiff had not from time to time, and at all times after the making of the said indenture, hitherto peaceably and quietly had, held, used, occupied, possessed, and enjoyed, all and singular the said premises, with their appurtenances, without any let, suit, entry, eviction, interruption, or disturbance, of the defendant; but that on the 1st of Yuky 1783, and from time to time from thence until the exhibiting of the plaintiff's bill on divers days and times during that time, when divine service was celebrated in the parish church of Oswertry, the defendant disturbed and hindered the plaintiff in the use and enjoyment of two pews in the said parish church, belonging and appertaining to the first mentioned messuage, in the said premises; that is to say, the defendant at some of those times sat in the said pews, and at other of those times put and caused to be put into the same divers other persons to sit in the said pews, without the leave and against the will of the plaintiff; and at other of those times locked up the said news and kept the same so locked up, without the licence or consent, and against the will, of the plaintiff, and hindered the plaintiff and his tenants of the said messuage, and his and their families, from sitting in the said pews, whereby the plaintiff could not enjoy the use and benefit of the said pews for himself, his tenants, &c.

To this declaration there was a general demurrer.

Bower, in support of the demurrer, submitted that though the injury complained of might be the subject of an action of trespass, it could not be the foundation of this action. The covenant, on the part of the granter, is to indemnify the grantee against all lawful disturbance: but the breach assigned gned is an unlawful trespass of the grantor himself; now covenant does not extend to the tortious acts of the grantor loss of the grantom vaugh. 123. 5 Vin. Abr. 156. pl. 7. If such an act as should be held sufficient to subject the grantor to an act of covenant, every time he happened to come upon the mises by accident, as in hunting, it might be construed a ach of his covenant. Here the defendant claimed no right the pew, therefore the act done does not fall within the use of the covenant.

LLOYD against

Wood, contra. It is only necessary to shew that the disturnce was a lawful one, if the action be brought against the intor for a breach of the covenant by the act of a stranger, cause the stranger's title is known to the grantee as well as grantor: but where the breach complained of, is the act the covenantor himself, it is not necessary to set forth his ti-, which may rest merely within his own knowledge; and ainst him any interruption is sufficient to support this action. Show. 452. And it would be very strange if the covenanr could excuse himself by alleging that he had been guilty a wrongful act of trespass.

Bower in reply. It appears from the case in Shower that ere was at least a claim of title on the part of the covenantor,

hich distinguishes it from this.

ASHHURST, J. The case cited seems to me to be a strong ithority, and applicable to the present. I should not indeed inclined to admit that, in the case put by the defendant's punsel of the covenantor's coming accidentally upon the presises in hunting, he would be liable to an action upon his coenant: but that is not the present case; and the answer there ould be, that it would not be done under an assumption of ght. But here the act itself asserts a title; for the defendant locked up the pew, which is as strong an assertion of ight as can well be imagined. It is not necessary in this kind faction that the party, against whom it is brought, should ave a title: it is sufficient if he does the act under a claim of ne.

Per Guriam.

Judgment for the plaintiff.

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Tuesday. May 1st.

# UNWIN against WOLSELEY.

In covenant on a charter party, whereby it was agreed to employ a ship of which the plaintiff was the captor. as soon as sentence of sbould bave passed, the sentence en to mean a legal sentence, and the party who sues for the freight must aver was condemned by ing competent jurisdiction. A servant of the crown contracting by deed government is not personally an-Swerubie.

The declara-A CTION of covenant on a charter-party. L tion stated the charter-party, made 23d of November 1781, at St. Helena, between the defendant, by the name and addition of captain Wolseley, commander of his majesty's ship Magnanime, and senior officer of his majesty's ships and vessels at St. Helena, (there being no commissary for prisoners there,) on account of his majesty, of the one part, and the plaintiff, by the name and description of G. Unwin, one of the agents of his majesty's ship Hannibal, of the other part, sealed, &c. wherein it was agreed between the plaintiff and the condemnation defendant respecting the taking the prize ship Le Seviere to be employed as a cartel to carry French prisoners to Europe, that as soon as sentence of condemnation should have passed must be tak- upon her, she should proceed with the French prisoners taken by the *Hannibal* to the first port in *France*. That the defendant, on account of the king, should put on board a commission officer, to have charge and command of her, and a midshipman to assist him, &c. That the defendant, on occount of the king, further consented and agreed, that if any accident should happen to the said cartel, either by fire, being that the ship stranded, or lost by any other unavoidable accident, whilst employed on that service, government should be answerable a court have for the sum of 1500% for the sole use and benefit of the cap-The the plaintiff, as part agent, and on behalf and account of the captors, did also consent and agree that he would leave the passage of those prisoners, if the cartel arrived safe, to be settled by the principal officers and commissioners of his majesty's navy, as they in justice to the captors should think on account of meet; and at such rate as had been usual in similar cases. That the plaintiff further consented and agreed, that if any provisions should remain at the end of the service, restitution should be made to government for the same, and that the . value should be deducted out of such bills as might be granted for that vessel's service. The declaration then stated that, before the making of the said charter-party, the said ship L Seviere and cargo had been seized and taken as prize of war by his majesty's ship Hamubal, and had been brought into St. Helena. That before the making of the said charter-party a certain suit or proceeding had been instituted in St. Heleng, on behalf of the captors of the said ship, before certain commissioners appointed according to the royal charters under the great seal, confirmed by several acts of parliament

for the purpose of distributing justice in all maritime cases whatsoever concerning any ships which might be brought, or persons who might come, within the jurisdiction of the powers delegated for the government of the island at St. Helena, against WOLDELEY. for the purpose of obtaining the sentence of condemnation of the said commissioners upon the said ship; which said suit was depending at the time of making the said-charter-party. That after the making of the said charter-party, to wit, on the 4th day of December 1781, &c. sentence of condemnation was passed in the said suit upon the said ship, by the said commissioners, whereof the defendant afterwards had notice; with an averment that the said sentence of condemnation was the same as that mentioned and referred to by the charter-The declaration then stated that the said ship had party. performed the said service by carrying the prisoners to port L'Orient; and that the ship was employed in that service three months and fourteen days; but that the defendant had not paid the freight, &c.

To this declaration the defendant demurred specially, and shewed the following causes; that it did not appear that the said ship called Le Seviere, in the said declaration mentioned, before or at the time of the making of the said charter-party, or at any time afterwards during the said employ, ever had been or was legally and in due form of law condemned, or finally adjudged lawful prize to his majesty, in any of his majesty's courts of admiralty in Great Britain, or in his majesty's plantations in America, or elsewhere, or in any other court having competent jurisdiction to condemn or finally adjudge the said ship lawful prize to his majesty; and also for that it did not appear how or by what lawful means the said ship had become or was the property of the plaintiff or the captors thereof, or that the plaintiff had the sole or any proportionable interest or property in the said ship; but on the contrary, the said ship, for any thing appearing or alleged in the said declaration, still remained the property of the king; and also, for that it did not appear that the said plaintiff had any right or cause of action whatsoever against the defendant; and also, for that it did not appear that the said commissioners, before whom the said suit for the purpose of obtaining the sentence of condemnation upon the said ship is supposed to have been depending, at the time of the making of the charter-party had any lawful or competent jurisdiction, power, or authority, to condemn or finally adjudge the said ship lawful prize

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WOLSELEY

to his majesty, according to the form of the statute in and

case made and provided, &c.

Baldwin, in support of the demurrer, contended that the action was not maintainable; first, because it did not appear by the declaration that the captors had any legal right to the ship, but that at the time of the voyage it remained the property of the king. Secondly, That the action could not be

supported against this defendant.

As to the first, all prizes taken by the king's ships are z the time of the capture the property of the king. By the 19 Geo. 3. ch. 67, the king is impowered by his proclamation to distribute the prizes after condemnation in what proportion he pleases; and the ships are to be considered as the property of the captors after condemnation by the court of admiralty; till condemnation therefore it remains the property of the king. When the ship in question was taken, it was incumbent on the captors to send her to England, or to some court having a competent jurisdiction, in order to give them the property by condemnation. It is true that the declaration avers that at the time of making the charter-party a suit was instituted at St. Helena for the purpose of condemning this ship. But the commissioners, before whom the suit was depending, had no right to condemn her; for there was no court of admiralty at St. Helena. These persons had no authority to determine questions of prize, but have only special and limited powers delegated to them for particular purposes by the East India company's charters.

Secondly, The defendant was not personally liable to pay this sum; for the contract was entered into by him on account of government. The charter-party expressly says that the defendant only treated on account of his majesty; and therefore this is a stronger case than that of Macbeath v. Haldimand, (a) where the contract was made by the defendant as the agent of government, and he was not held personally liable. And whether the contract be by deed or not is perfectly immaterial, the nature of the contract and of the agent's liabli-

ty being still the same.

Mood for the plaintiff. First, It must be taken upon this record, that the commissioners condemning had a competent jurisdiction, unless the contrary be shewn by those who dispute it. If the defendant had intended to controvert their authority, he should have pleaded it. But, by demurring he has admitted the legality

(a) Ante 172.

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egality of the sentence. At any rate, however, the right of possession became vested in the captors from the moment of the capture; and a possession is prima facie sufficient to entitle the plaintiff to recover on this declaration. The defendant who against Wolseley nas had the use of the ship under the plaintiff, cannot now be permitted to dispute the plaintiff's right, any more than a tenant who holds under his landlord. Even if there were any ground for the objection, the plaintiff is estopped by his deed from making it, because by that he has referred to the sentence. The contract was expressly made with a reference to that prozeeding; the suit was the basis of their contract. As to these parties therefore, and to this purpose, it is immaterial whether the commissioners had any right to condemn or not. It makes no difference here, whether the sentence was strictly legal or not; for it was only to fix the time when the contract was to take effect; it being agreed, that the contract should commence as soan as the sentence had passed.

Secondly. As the defendant has entered into this contract, and bound himself under seal, he is personally responsible. Although he entered into the contract for government, yet he must be taken to be personally answerable, unless there be some exception as to his liability. For it would have been useless to have bound himself by this deed, if he himself were not to be answerable, since it could not affect any other person. This therefore distinguishes it from the case of Macbeath v. Haldimand; for there the contract was not under seal, and the intention of the contracting parties was explained by other evidence. But this is a precise and specific contract under seal.

by which the defendant is personally bound.

Baldwin in reply. The defendant is not estopped by the charter-party from excepting to the legality of the sentence. It refers only to the time when a sentence of condemnation shall be had; for it says, "as soon as condemnation shall be 46 passed." So that it does not admit the condemnation. It is said that the defendant might have pleaded that the commissioners who condemned had not a competent jurisdiction; but the objection is that, as the plaintiff's demand arises on the condemnation, it was incumbent on him to shew that the ship had been condemned by a court having a competent juzisdiction, in order to entitle himself to recover. As to the second point; it appears to be a contract made on the part of government throughout, and that the defendant was not to be personally liable. Vol. I.

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ASHHURST, J. As to the first objection, it appears to be more doubtful than the second, though I should be inclined to decide in favour of the defendant, even on the first objection. The words are, "as soon as a sentence of condemnation should have passed." That must be taken to mean a legal con-And though it is afterwards stated in the declaration that the sentence of condemnation which was passed was that referred to by the charter-party; yet that, being a matter of law, cannot be supplied by any averment that it referred to the sentence of condemnation at St. Helena. If there could be no legal condemnation except by the court of admiralty, it must be taken that the parties meant that. this sentence of condemnation was passed by a court out of the ordinary course of law, and not authorised by any public act of parliament, the plaintiff should have shewn that it was made by a court having competent jurisdiction. We do not know that the commissioners at St. Helena have a proper legal authority to proceed in rem, and condemn any ship carried into that port. A legal condemnation was a condition precedent, which ought to have been made out by the party claiming the benefit of it. However, it is not necessary to decide upon this part of the case, because I am clearly of opinion, on the second objection, that the action is not maintainable. It would be extremely dangerous to hold that governors and commanders in chief should make themselves personally liable by contracts which they enter into on the part of government. It would be detrimental to the king's service, for no private person would accept of any command upon such terms. The case of Macbeath v. Haldimand seems to me to govern the present. It was there determined, that a commander was not answerable for contracts entered into by him on behalf of government. And whether the contract be by parol or by deed, it makes no difference as to the construction to be put upon it. That indeed was a stronger case than the present; because there it was left open to evidence, from whence it was to be inferred that the contract was made by the defendant as the agent of government: but here it appears in express terms that the defendant entered into this contract, on the behalf of government. For there is an express allegation in the beginning, that he made the contract "on account of his majesty;" and the subsequent part, "that government should be answerable for 4 1500% in a certain event," makes it perfectly clear. fore

ore the defendant only meant to contract as the servant of overnment, and not to bind himself personally.

BULLER J. and GROSE, J. declared themselves to be of the

ame opinion.

Judgment for the defendant.

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# The KING against THOMAS CLARKE.

HE defendant, who was described as a merchant, was in- A younger dicted at the Middlesex sessions 1787, for refusing to the corporaake upon him the office of head-borough for St. Mary Mat-tion of the ellon, otherwise Whitechapel, when the jury found a special Trinity-'erdict, which stated in substance as follows.

That the defendant was an inhabitant of Whitechapel, in the serving the county of Middlesex, and was a fit and proper person to serve office of he office of head-borough for the same parish; and that on head-bohe 28th of March, in the 25th year, &c. within the said paoffice of conish and county, at an assembly of the inhabitants of the said stable may parish, held for the purpose of choosing an head-borough and be served by constables for the said parish according to the ancient custom, deputy. Sc. he was elected and chosen by the inhabitants of the same may grant parish into the office of head-borough for the space of one exemptions year; that the defendant had due notice of his being so elect- from serving ed, but that he afterwards refused to take upon him the said offices of this sort, office. The verdict then stated a charter of Hen. 8. made in provided a the 6th year of his reign, whereby he granted, and gave li\_sufficient zence, for himself and his heirs, to his beloved liege people number of and subjects, the shipmen or mariners of his realm of England, left to serve that they or their heirs might of new begin, erect, create, or-them. lain, found, unite, and establish, a certain guild or perpetual fraternity of themselves and other persons whomsoever, as well men as women, in the parish of Deptford Strond, in his county of Kent, and that the said guild or fraternity might be one body and perpetual community by the name of the Most Glorious and Undividable Trinity of St. Glement; and that the brethren of that guild and their successors might annually elect, ordain, and successively constitute, one master, four wardens, and eight assistants, for the government of the guild or fraternity. He also granted that the aforesaid master, wardens, and assistants, and their successors, might admit, and accept whatsoever persons, his natural subjects only to be born within his realm of England and other places under his allegiance, and not others, which would be of the

exempt from

The King against Thomas Clarke.

guild or fraternity aforesaid, as brethren and sisters of the said guild or fraternity, &c. Which said charter was then and there duly accepted by divers beloved liege subjects of the shipmen and mariners of the said realm of England. It then stated a charter of Queen Elizabeth, in the 36th year of her reign, by which she granted and confirmed to the master, wardens, and assistants of the Trinity House, and to their successors for ever, the lastage and ballastage, and office of lastage and ballastage, of all ships and other vessels whatsoever, in the river of Thames or elsewhere, betwixt the bridge of the city of London and the main sea, and also the beaconage and beoyage, &c. in England; which charter was also accepted.

It then stated a charter granted by Car. 2. in the seventeenth year of his reign, which after reciting the danger arising to vessels from shoals in the river, and that the master, wardens, and assistants of the Trinity House had covenanted to keep a certain number of lighters for removing the gravel and sand for the ballasting of ships, &c., proceeded thus; and, to the end that the said service might be better performed, and that neither the said master, wardens, and assistants of the Trinity House aforesaid, and their successors, deputies, servante, or assigns, or any of them, might be hindered or letted in the maneging of the said work of ballasting of ships, and cleansing of the river aforesaid, his said majesty did (amongst other things) for himself, his heirs, &c. strictly charge, will, require, and command. all and every his officers and ministers whomsoever. and all others, to whom it should or might appertain, that they, and every of them, should forbear to arrest, press, or take fer the service of his majesty, his heirs, &c. or personally to serve in any office or place, military or civil, any person or persons being members of the said corporation, or any of the officers, feetors, workmen, or servants, or any the boats, lighters, or other vessels of the said master, warden, or assistants, or their successors, deputies, or assigns, or any of them, employed or to be employed, in and about the said ballasting of shipe, and the said work of cleansing the said rivers as aforesaid, except his said majesty, his heirs, &c. or the lords or others of the privy council for the time being, should be first acquained therewith, and his or their licence obtained, that that charter was likewise accepted.

It then stated a charter of king James 2. in the first year of his reign, by which he granted and directed that there should be for ever afterwards one master, four wardens, eight as-

sistant,

aistants, eighteen elder brothren, (besides the master, wardens, and assistants,) and a clerk of the guild, to be severally elected as is therein mentioned, and that all the rest of the sea- The King men and mariners of, and belonging to, the said guild, and their successors, &e. should be called younger brethren; and that the said master, wardens, and assistants or the greater part of them, together with the major part of the said elder brethren, might at all times thereafter, at their will and pleasure, admit, receive, and take in whatsoever person or persons, his majesty's matural subjects, who should be desirous to be of the said guild, as brothers of the said corporation, who should be called young-And the charter, after reciting that forasmuch er brothers. as the master, wardens, and assistants, being oftentimes to be employed at one hour's warning in his said majesty's service at the sea, in and for the good and necessary defence of his realms and kingdoms, could not give their due attendance therein with such diligence as their duty was to do, by reason that they were many times compelled to bear armour, or to contribute to the charge thereof for land service, as also to serve upon inquests and juries at a sizes, sessions, courts-leet, courts-baron, before the coroner, and in all other courts, commissions and places of jurisdictions, to the great vexation and burthen of the said corporation, and to the peril of the said service of the sea, &c. therefore his said majesty did will and grant. by the said charter that they and every of them, and all and every other brother and ministers of the same, being mariners, and seafaring men, and their and every of their servants and apprentices, from thenceforth should be discharged and exempted of and from the bearing or finding of any armour, to or for any land service, at or upon any general muster, or other view, to be taken of armour, &c. and from contributing to the setting forth of any soldiers to be employed or set forth to or for land service, other than as mariners and seamen in sea service; as also that they should be in like manner discharged and exempted from being summoned and put in assize, juries, inquests, inquisitions, attaints, and other recognizances, taken or summoned within the said counties or places, or any of them, unless they the said master, wardens, and assistants, and other seemen and mariners aforesaid. should be thereunto compelled or compellable by reason of their tenures, or unless it should be for his majesty's service at every admiralty sessions which they should be always bound to attend upon at their perils; and moreover that they should be likewise exempted and discharged from being otherwise

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1787. taxed to, for, or with, any manner of land service whatsoever, other than is aforesaid, or to be contributory to the same. The King further stated that a list or register of the younger brothers of the guild, fraternity, or brotherhood, always, since the making CLARKE. of the said last mentioned charter, has been and still is kept by the said guild. That the defendant, at the time that he was so elected and chosen into the said office of head-borough for the said parish of St. Mary Whitechapel, was, and now is, a youager brother and member of the said guild, fraternity or brotherhood, regularly and duly chosen and admitted as such: but whether. &c.

Sulvester for the prosecution. In order to determine how far the defendant, as a younger brother of the Trinity House, is exempt from serving the office of head-borough or constable, it is necessary to consider three points. First, The nature of the office. Secondly, The exemptions known to the law of England. Thirdly, Whether by virtue of the charter stated in the special verdict the defendant is entitled to any exemption. First, The office of constable or head-borough is an ancient law office, ministerial in its nature, and not judicial. Every person (unless specially exempted) is liable to serve it in the parish in which he resides, either by himself or his deputy, who, when appointed, has all the privileges of the constable himself. 2 Hawk. P. C. c. 10 s. 36. Dalt. c. 1. Roll. Abr. tit. Deputy 591. The duty of serving this office is of so high a nature, that it supersedes that of every other office of a later date; the possession of any such, therefore, is no excuse for not executing the office of constable. 1 Lev. 233. Sid. 355. 2 Hawk. P. C. c. 10. s. 31.

Secondly, As to those persons who are by general law exempted from serving the office of constable; they are either by custom, or by act of parliament. Those by custom are, members of parliament, barristers, justices of the peace, clergymen, attornies, and the king's servants. By 5 Hen. 8. c. 6. surgeons are exempted. By 32 Hen. 8. c. 40. the president and fellows of the college of physicians. By 6 & 7 W. 3. c. 4. apothecaries. By 10 & 11 W. 3. c. 23, the prosecutor of a felon to conviction, or the person to whom he shall assign his certificate. By 30 G. 2. c. 35. and 2 Geo. 3. c. 20. militia men doing actual duty. And lastly, the statute 31 G. 2. c. 17. exempts those persons who are of the age of 63 or upwards. Every other person whatever, who cannot shew a special exemption, falls of course within the general law of the land, and is bound to serve the office in his turn,

Thirdly.

against THOMAS CLARES.

Thirdly, It is to be considered whether the defendant, unler the description of a younger brother of the Trinity House, s specially exempted by charter from serving this office. The The KING claim is founded upon the clause in the charter of Car. 2. whereby the king charges all his officers, ministers, &c. not to arrest, press, or take, &c. Now these words, from the nature of them, can only relate to military service, and are an exemption only from that; and no exemption from serving this office can be intended from what follows, " or personally to serve in any office, &c." because this office may be executed by deputy. But even that exemption is restrained to such persons therein named as are employed about the ballasting of the ships, whose presence could not be dispensed with. it is to be observed, that the office of younger brethren did not exist under this charter, but was first created under the subsequent charter of Jac. 2. If the crown has the right of granting so unlimited an exemption as this, it may be extended to every person in any particular parish; for the number of these younger brethren is indefinite, and no qualification is necessary before they become such. Every one of the king's natural born subjects may become a member of the corporation if he be desirous of it; so that in some parishes there might be no person left to fill the office of constable. The crown, therefore, even supposing the present defendant to come under the words of exemption, could not grant so extensive an authority to any body of men.

Wood, contra, did not deny the definition of the office of constable to be as it was stated; but said as it was clearly a civil office, it came under the exemption in the charter of Car. 2. which excused all the members of the corporation from serving offices, civil as well as military. And there is no objection from the number of members being unlimited, because that might equally be urged against every other corporation; most of whom have a discretionary power vested in them of enfranchising whomever they please. If, indeed, they abuse that power, then, as in all other cases of abuse, it may furnish a ground for repealing the patent. But laying that out of the question; the defendant certainly comes within the description of persons intended to be exempted contained in the first part of the clause, "that no member of the corporation " shall be chosen into any office civil or military;" and that general exemption is not confined, but rather enlarged, by what

THOMAS CLARKE.

what follows, by which it is extended even to the servents of the corporation who shall be employed in cleansing the rive. The Kino The question therefore is reduced to this, whether the king has such a power of granting exemptions? In 2 Roll. Mr. 198. R. 2. it is said that the king may grant an exemption from serving on juries; and this is confirmed by a subsequent care in Saville 43. & Godb. S. C. where an exemption from the of fice of sheriff was claimed by all the inhabitants, &c. of the Cinque Ports. But though this was negatived by the Court in the extent claimed; yet they allowed that the exemption extended to inferior offices, such as that of constable, &c. So in Sid. 287. where an officer of the mint claimed to be exempt from serving the office of alderman of London, it was allowed that the king might grant such an exemption; and that certainly was an office higher in its nature than the present As to what has been urged, that the exemption does not extend to such offices as may be served by deputy; if that were an answer, the same might be said in every case, even in the very cases of exemptions cited and allowed on the other side. But that has never been held to make any difference; the same privilege which protects a man from serving an office in person, necessarily supersedes the obligation of serving it by deputy, otherwise the privilege would be nugatory. In Cro. Cor. 585. it appeared that John Abdy, alderman of London, had been fined for not taking upon him the office of constable, w which he had been appointed in a court-lest of a manor in Esex as an inhabitant thereof. But the court held him discharged by reason of his privilege. And although it was there arged that he might execute the office by deputy, yet that was held to be no reason for compelling him to take it. Now that exemption must have been claimed by virtue of the king's charter granted to the city of London. So in the King and Routledge (a,) a servant of one of the colleges was held exempt by the privileges of the university from serving the office of constable in the city of Oxford; which privileges must have arisen by charter. And in the case of the vicar of Dartford (b), the court granted a writ of privilege from serving the office of expenditor to the commissioners of sewers, although it was there said, that the office might be served by demon. Besides, the king having by virtue of his prerogative the preservation of the peace entrusted to him, may of course exempt all persons whom he pleases from serving any effects

(a) Dougl. 513.

(b) 2 Stra. 1107.

schative to the preservation of the peace; and if any distinctican is to be taken concerning the nature of the office, there secure to be much stronger reason why he should be able to The Kink grantexemptions from serving ministerial than judicial offices.

He then montioned several instances in 1714, 1741, 1750, Classez 1757, where younger brothren of the Trinity House having been indicted for not serving this office, Nohi prosequi had been granted by the several Attornies General; and also se-Peral metances where they had been discharged from serving on juries.

Sylvester in teply. As to the instances of Noli prosequi having been granted by the Attornies General, that can have no weight in this Court; and besides, the late and the present Attorney General have repeatedly refused to allow them. No case has been cited to prove the general power of the king to exempt from serving common law offices, where the right of election is in the parish, and they are not appointed by himself, and where the mischief may be so extensive as in the present case. The court ought always to guard against such a claim in any new instance. As to the case of the alderman of London, the exemption was allowed to him in respect of his duty as a magistrate, which obliged him to reside in London. And both in the case of London and Oxford the charters have been confirmed by act of parliament.

ASHRURST, J. This is a question of great importance to the public. I should be far from laying it down as my opinion that the crown cannot grant exemptions of this sort: but these grants of exemption from serving common law offices ought to be construed strictly; and unless the exemption be granted in the most explicit terms, it ought not to be al. lowed. Now apply that rule to the present case: it does not appear that the exemption is explicitly granted to that description of persons under which the defendant claims. Had this part of the corporation existed at the time of granting the charter of Charles the Second, I should have thought that she exemption did extend to them, because the words are very comprehensive, though the meaning is rather awkwardly expressed; for it says " they shall not be arrested, pressed, or talen." &c. But at all events that charter can only exsend to the persons named therein. The appointment of the present defendant is under a new power granted by the charter of Jac. 2. which enables the master, wardens, and elder brethren, "to admit, receive, and take in whatsoever person or persons should be desirous to be admitted as · Tttt Vol. 1.

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against CLARKS.

.vounger brothers." Therefore the charter of Charles the Second not taking notice of younger brethren, they cannot The King claim any exemption under that charter. Now the charter of James the Second granted particular exemptions; and it is observable that, as it enlarged the number of the corporation, the inconveniencies of extending all the former privileges to the new members were foreseen; all the offices there enumerated, from which the members are exempted, are such as require personal service: but that charter did not intend to exempt them from serving such offices as might be executed by deputy. But the exemptions granted by the charter of Charles the Second do not extend to the new members created by the subsequent charter of James the Second.

BULLER, J. As to the power of the crown to exempt from serving offices of this nature. I thought that had been clearly settled by some late cases; and particularly by that of the King v. Pugh (a). The crown undoubtedly has the power of granting the exemption, but then the common law engrafts some qualifications on it. For the crown may exempt from serving particular offices, provided there be a sufficient number of persons left to serve the office (b). therefore, in order to compel a person to serve the office, who claims an exemption under a grant from the crown, it is incumbent on the party disputing the claim to shew that it is absolutely necessary for the sake of the public that he should serve. However it is not necessary to decide that now. For taking it for granted that the crown has such a power, the question here is, whether persons of the defendant's description are exempted. The question arises on two charters, one , of Charles the Second, the other of James the Second: both of which are material in order to decide this point. By the charter of James the Second, elder and younger brethren, were first appointed. The defendant claims as a younger brother of this corporation; and it does not appear that he had any previous qualification before his election. .. But, on the construction of the charter of Charles the Second. I think a previous qualification was necessary. It seems from the general power in all these charters that the crown intended only to incorporate sea-faring men, who were likely to render some service to the public: but it is true that others may be admitted; for the charters extend to "all per-" sons." The charter of James the Second which speaks of elder

<sup>\* (</sup>a) Dougl. 179. (b) Vide Tredymock v. Perrymun, Gro. Car. 260. 2 Int. 129. 1 Sid. 272.

elder and younger brethren, expressly says that " all the rest of the seamen and mariners of and belonging to the said guild shall be younger brethren." It is not stated that the present The King defendant is a seaman or mariner; and we cannot presume that he is. Then can he claim any exemption under the charter of Charles the Second? The clause does not extend to him. In the first place he does not come within the reason on which the exemption in that charter is founded, namely, that persons belonging to the Trinity House might not be nindered in their works. In the next place, the exemption s not granted to the corporation; but it is a charge to the cing's officers not to arrest, press, or take them, without apolying to the crown. But if the king do not choose it, they are not exempted; and this is a prosecution set on foot by the rown; the crown now calls on the defendant for his services. It is not necessary to decide whether any officer of the crown, who should take the defendant without the consent of the rown, would be liable to punishment. But the question zere is, whether the defendant is personally entitled to be lischarged or exempted? I think not. It appears from the vords of this charter that the crown has the power of exemption in cases where the personal service of the man is rejuired; the reason of which is that they should not be prerented from doing this work: But that does not extend to he office of constable, because personal service is not necesary (a). Next as to the persons employed in ballasting: The words "employed or to be employed" admit of two diferent constructions. They might be confined to boats, lightrs, &c. they being the last antecedent: But it is impossible o to construe them; because the words are, "that they shall not arrest, press, or take any person, being a member of the corporation, or any of their servants, or boats, &c. or ' any of them employed, &c." Then if they be not restraind to the last antecedent, they must refer to all persons menioned before. And then it must be taken to mean that no erson shall be exempted but those who are employed in bal-And the difficulty suggested, that the asting of the ships. xemption would not, according to that construction, extend o the master, warden, and assistants, would not arise; for, n order to claim the benefit of this exemption, it is not neessary that the persons should be manually employed; it is juite sufficient if they be employed in giving directions.

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(a) Vide 3 Burr. 1262.

against THUMAS Clarke.

The only case which induced me to entertain any doubt, was that of the alderman of London: But that did not proceed The King upon any exemption claimed by charter. For there the defendant urged that, as alderman of London, he was by the common law bound to reside in the city of Landon, and therefore not compellable to serve any office elsewhere, Besides, the last objection seems to have been thrown out at the latter end of the case; and "non allocatur" is added without any reason being assigned; and the first question had been previously disposed of. However, that case does not by any

means govern the present.

GROSE, J. This is an indictment against the defendant for refusing to take upon him an office, to which he appears on the face of the indictment to have been legally elected. Now the office of a constable is an office under the crown: And whether he be chosen by the parish, or at a court-leet, (which is a court of the crown,) it makes no difference. It being such, the grown may exempt any person, or whole bodies corporate, from serving that office, provided the exemption be not extended so far as to prevent the existence of the office in any particular place. A power, exercised to such an extent, would be illegally exercised: But it is undoubtedly competent to the crown subject to this restriction, to exempt certain persons from serving the office of constable. the question is, whether the crown has so exempted this defendant? If it were the apparent intention of the crown that he should be exempted, I should hold that he was so. we must consider, whether on the face of this record the defendant was intended to be exempted by the charter of Charles the Second. It is clear that the command contained in the clause, under which the exemption is claimed, is merely to forbear to arrest, press, or take for his service. &c. or personally to serve, &c. This contains no exemption from the office generally; it is only an inhibition to the officers of the crown not to take the members of the corporation to serve personally. It contains no exemption from any offices which may be served by deputy; the exemption (if it be one) is only from those offices which require personal service. And this is corroborated by the charter of James the Second; for that gives only a protection from personal service. recites the inconvenience to his majesty's service, arising from the members being liable to serve on inquests and juries. by reason of which they could not attend to their duty. Now all the duties there mentioned require personal attendance. This therefore is a strong explanation of the former charter, and

shows that that only extended to personal services. Then Question is, has this defendant been chosen to an office we he is personally to serve ? We all know the office of The Kinu be table may be served by deputy (a); and therefore he is : Czowstod under these charters.

against THOMAS CLARKE.

Judgment for the prosecutor.

(a) Fide 3 Burr. 1262. Gald 259, 60, 2. post. 2 vol. 395.

# The Mayor of LYNN against DENTON.

Wednesday. May 2d.

THE Corporation of Lynn brought an action of assump-Where a sit against the defendant for tolls upon coming into their corporation The defendant claimed an exemption as a freeman of in a civil acndon, and moved the Court on a preceding day in this term tion, leave r leave to inspect the corporation books of Lynn.

to inspect their books

Partridge was to have shewn cause against the rule; but The Court would not permit him. For they said that, upon the defendquiry, it appeared to have been the general practice for ma- ant of course years past to grant applications of this nature, notwithanding a contrary practice might formerly have prevailed They said that it had been decided in a great many cais (c); and the foundation of the rule was that, as the court Chancery would order inspection merely for asking, this ourt had also adopted the like regulation, in order to save spence to the parties. And it having been pursued so long, vey would not now enter into a discussion of it (d).

The Court at the same time gave the plaintiff leave to in-

sect the corporation books of London.

(b) Vide 3 Wile. 398 and 5 Mod. 395. (c) Vide 2 Stra. 1223. (d) I cases of criminal prosecutions. such as the King and Parnell, 1 Wils. 19. 1 Blac R.37. S. C. The King v. He, uon, 1 Blac, 351. and in an action for a pedty against a post-master, on 9 Ann c. 10. leave to inspect books has been deed. 2 Stra. 1005. See also post. 3 vol 141. 303. H. Black. Rep. C. B. 211.

### BRANDON against PAYNE.

Wechesday, May 2d.

HE writ in this case was returnable on the 6th of Febru-Plaintiff ary 1787. The declaration was filed in the office on the may sign th, and a rule to plead was served on the same day. But no- judgment if ice of the declaration having been filed was not delivered till defendant he 8th; plea in abatement on the 15th; and judgment signed batement on the 16th. A mile having been filed was not delivered till defendant plead in abatement on the 16th. A mile having been filed was not delivered till defendant plead in abatement on the 16th. A mile having been filed was not delivered till defendant plead in abatement on the 16th. on the 16th. A rule having been obtained to shew cause why after the

four days, the though no

rule to plead has been regularly served. 1787.

BRA DOY **ag**ainst PAYNE.

the interlocutory judgment should not be set aside for interlarity;

Shepherd shewed cause. The irregularity in serving an to plead before notice of the declaration (if it were any) waived by the defendant's pleading. And the plea in ab ment not having been pleaded within the four days, the indi ment for want of a plea was regular.

Lowndes in support of the rule. The declaration is o well delivered from the time of the notice of the declaration and the rule to plead was served before that time, which irregular and void. Grey v. Saunders (a). Then the que tion is, whether by putting in a plea in abatement, which a nullity in itself, the defendant has waived that irregulari Now if it be a nullity to one purpose, it must be so to a The rule to plead was not introduced for the benefit of the party, but of the Court; if so the defendant could not di pense with it.

The party may undoubtedly dispense will Per Guriam. the rule to plead. And here the defendant has superseded necessity of a rule to plead by pleading in abatement.

Rule discharged

(a) Barnes 248.

Verberday, May 2d.

# SAWYER against MERCER Administrator, &c.

adgment recovered on a simple contract, pleaded by administrator to debt on bond, must aver that such recovery was

had before

bond debt.

EBT on bond against the defendant as administrator. The defendant pleaded a judgment confessed on a preceding day in the same term in which this action was commenced, in an action on a simple contract; without avering that he had no notice of the plaintiff's demand.

To this there was a general demurrer.

Wood in support of the demurrer.

Shepherd contra, cited 5 Co. 83. Vaugh. 89 and 3 Mod 115. The Court were clearly of opinion that this plea was bad; it was directly contrary to all the precedents on the subject, and if permitted would overturn the whole order of admininotice of the tration. For that it would enable an administrator in many cases to defeat a specialty creditor by confessing as many jedgments as he pleased on simple contract debts.

Judgment for the plaintiff.

### BARRY against RUSH.

1787. Weanendan May 2d.

EBT on bond. The plea first craved over of the bond Where the (by which the defendant, as administrator, bound him-defendant his heirs, &c. to the plaintiff as executrix); and then of self as adcondition, which (after reciting that the plaintiff and the ministrator endant had agreed to submit to arbitration certain disputes to abide by ch had before arisen between the plaintiff, and defendant's an award to state, touching certain articles of agreement between the touching state and the plaintiff's testator) was for the performance matters in n award to be made by arbitrators concerning the matters dispute between his resaid, and also concerning all other matters, accounts, intestate . between the said parties or either of them. It then set and anoth that the arbitrators had awarded that the defendant, as ther, and ninistrator, should pay to the plaintiff, as executrix, 2984 the arbitrators award-27th June following, and that the parties should execute ed that he The defendant then pleaded that he had as adminiseral releases. ly administered; and that at the time of entering into the trator id, or afterwards, he had no assets, &c. To this plea there was a general demurrer, and joinder. Morgan was to have argued in support of the demurrer; plene admit the Court desired the defendant's coursel to begin, Gibbs contended that the defendant was not bound by the the bond. ms of the award, to pay the money awarded absolutely, but ly as administrator, out of the assets of the intestate. This pears clearly from the words of the bond; for he is there ly bound as administrator, and of course is only liable to y this debt, as the law would subject him to the payment of y other debt, in the capacity of administrator. But if there any ambiguity in the words themselves, the Court will look the subject matter of the arbitration. Now the only matr referred was the difference between the plaintiff and the fendant's intestate; and the general words which follow, mely, "all other matters, &c. between the parties," must late to the same parties in the same capacities before deribed. This is the only construction that can support the vard; for if any other construction were to prevail, the ward would be bad by comprising a subject not referred, and en the plaintiff could not have judgment. Veale v. Warner, Saund. 326. The award of mutual releases to be given by re parties is clearly bad, inasmuch as it exceeds the power This then must vitiate the whole, iven to the arbitrator. ecause nothing is then to be done by one party. Ashhurst.

should pay. ೮c. he can not plead

Baray against Rush. Ashhurst, J. The court cannot intend that any thing we ordered to be released, except the matters in dispute between the parties. We cannot intend that the arbitrator has done wrong. But laying that out of the question, there is no done but that this plea is bad: for the entering into the bad amounts to an admission of assets; and the defendant shall at afterwards be permitted to dispute it. The bond given by the defendant to abide by the award was an undertaking to pay whatever sum the arbitrator should award, without any regard to assets.

BULLER, J. This is a bond given by the administrate, by which he bound himself, his heirs, executors, and administrators. The question then is, whether he has bound himself personally or not? And I think there can be no doubt but he has. With regard to the releases, it must be expounded by the rest of the award. It will be sufficient for the defendant

to give a release in the character of administrator.

Per Curiam.

Judgment for the plaintiff (a).

(a) Vide Pearson and others, assignees of Scott v. Zenry, administrated Henry past. 5 vol. 6.

Thursday, May 3d.

# The KING against HOLLAND and FORSTER.

An information will be granted against a justice of the peace as well for granting as for refusing an elicense improperly.

An information had been moved for against the defendant, who were justices of the peace for the county of Middle sex for improperly granting an ale license to one Harrison, was had been refused one by the justices at their last general meeting on account of misbehaviour. It appeared that the defendant Forster had been present at that general meeting at the time when the license was refused; but he had afterwards told the other defendant, Holland, who was not present at the general meeting, that the only reason why a license had not been granted then was that they might have an opportunity of enquiring into the character of Harrison, and had accordingly prevailed upon Holland; at a private meeting held by these two only, to join in granting a license.

Bearcroft and Erskine against the rule: Law and Garren

in support of it.

The Court were clearly of opinion that as information should be granted against a justice as well for granting a license improperly as for refusing one in the same manner. That is had already been done in the case of The King against Filment

'ilewood and Another (a). And indeed the mischief of granta license improperly was infinitely greater than that of ifusing one; for in the former case it might be productive of The King njury to the whole community, while in the latter the grievnce was felt only by the individual. That the only ground & FORSTER. f these applications was the improper conduct of the magisrates. But as it appeared in this case that Holland, though ot altogether blameless, had been deceived by Forster, they ischarged the rule as to the former, upon his paying the costs f the application, as against himself; and as to Forster, they ranted the information (b).

(a) E. 26 Geo. 3. B. R. (b) Vid. R. v. T. Sainsbury, Esq. and Another, oet. 4 vol. 451.

#### HARE against LLOYD.

Thursday. May 3d.

HE defendant, having pleaded a judgment recovered, After a rule was ruled to abide by his plea, or to plead such a plea to abide by is he would abide by; and, on his afterwards pleading a spe- plea or plead ial plea, the plaintiff signed judgment, which the defendant such other moved to set aside for irregularity. plea as the

Shepherd, against the rule, contended that the judgment defendant was regularly signed for want of a plea; for that the defend- he can only after being ruled to plead such a plea as he would abide plead the geby, could not plead a special plea. neral issue.

Mingay, in support of the rule, insisted that the defendant was at liberty to plead specially: it might have been otherwise if the defendant had been ruled to plead issuably.

The Court, on the authority of the case of Prout and Dewar (c), (which the Master read from his note book),

Discharged the rule (d).

#### Uuuu Vol. I.

(b) PROUT v. DEWAR, E. 24 Geo. 3. B. R.

Shepherd shewed cause against a rule, obtained by Baldwin, for setting aside the judgment under these circumstances. The defendant pleaded a recovery by a former judgment, upon which the plaintiff obtained a common rule, that the defendant should abide by his plea already pleaded, or plead such other as he would abide by. The defendant thereupon waved his former plea, and pleaded another special plea, upon which the plaintiff signed judgment.

Shepberd contended that the defendant could not wave one special plea, and

plead another, but was confined to plead the general issue.

Baldwin, contra, insisted that the defendant might plead any other plea, special or otherwise, so as he abided by it.

Per Curium, Under such a rule, if the defendant wave his special plea, he can only plead the general issue. Rule discharged.

The Master also favoured us with the following note;

Cockran v. Robertson, Mich. 20 Geo. 3. B. R. Cowper moved to set aside a rule to plead several matters, and the plea of set-

off pleaded in consequence thereof, upon this objection; that, the defendant having

(d) Simon v. Dillon, H. 26 G. 3. B. R. S. P.

1787.

Saturday, May 5th. The KING against The Inhabitants of MURSLEY.

No settlement is gainter tell the servant at the hiring not belong to the parish, and the sessions state such contracis to be fraudulent.

HIS was a special case, (upon an order of removal,) which set forth, That William Coleman, the pauper, on ed by a nir-ing and ser- his oath declared that he he was born in the parish of Redvice for less bourn, Herts, and that three days after Michaelmas 1782 he than a year, was hired by James Pollard in the parish of Mursley, Bucks, tho' the mas- to serve him in husbandry until the Michaelmas following; that he served him the whole of that time, and received the whole of his wages. That the pauper declared that James that he shall Pollard at the time of hiring him told him he should not belong to the parish of Mursley. The court of sessions stated that they were of opinion that all such transactions on the part of masters are fraudulent to prevent servants gaining settlements by virtue of their services. And they adjudged that the pauper gained a settlement in the parish of Mursley by virtue of such hiring and service, and confirmed the order of justices, by which the pauper and his wife were removed from Redbourn to Mursley.

Bearcroft, in support of the order of sessions, contended, that as the sessions had found this hiring to be fraudulent, this court could not adjudge it not to be fraudulent. And that even if they could, this case would not warrant a different conclusion; because the master hired the pauper in such a

manner as to endeavour to defeat his settlement.

Manley, contra, was stopped by the court.

ASHHURST, J. This is a very clear case. a naked fact that the pauper was hired three days after Michaelmas. It does not appear to have been a concerted scheme between the parties to prevent the pauper's gaining a settlement; for non constat that they ever saw each other till the actual time of hiring, which was three days after Michaelmas. This therefore cannot be taken to be a hiring for a year.

ing pleaded a judgment recovered in a former action, the plaintiff obtained a rule for the defendant to abide by his plea, or plead such other as he would abide by. The defendant had pleaded a set off, which Comper insisted he could not do but could only plead the general issue after waving his special plea.

BULLER J. said the practice was so; but that the defendant might have pleaded the general issue, and given notice of set-off; and that this was a fair plea.

Cowper admit ed the fairnes of the plea, and said that if defendant would take short notice of trial he had no objection to it.

A rule to shew cause was granted.

BULLER, J. There must be by some means or other an hir- 1787. ing for a year and a service for a year, in order to give the servant a settlement. The question of fraud only arises where The King in truth there is such an hiring, but the parties endeavour to against The Inhabicolour it in order to prevent the pauper's gaining a settlement. In such a case, the Court may say it is fraudulent. For sup- MURSLEY: pose the master had hired the servant three days after Michaelmas to serve till the Michaelmas following, and had agreed with the servant that he should give in three days after the expiration of that time; that would be construed to be an hiring and service for a year. But the master may, if he please, hire a servant for a less time than a year, for the express purpose of preventing his gaining a settlement.

GROSE, J. If the opinion of the court of sessions amount to any thing, it goes the length of saving that all hirings for less than a year are fraudulent. It must be admitted that a master may hire a servant for six months only; and the same reason will equally permit him to hire a servant for a year

short of three days.

Rule absolute (a).

(a) R. v. Sulgrave, post. 2 vol. 376.

# KING against PIPPETT.

Thaving been determined in last Michaelmas term (a) that Where the the defendant was not entitled to sign judgment as in case defendant of a nousuit in this cause, because he might have carried the the record by record down to trial, at the last Summer assizes, by proviso; proviso, it is the defendant, on the 8th of last March, (the commission day sufficient if he obtain the being the 19th,) gave notice of trial, and on the 10th of March usual rule for obtained and served the usual rule for a trial by proviso; and trial by prothe plaintiff, not appearing at the trial according to this notice, viso, any time before

Law now moved to set aside this nonsuit, contending that though it be the notice given by the defendant was irregular for want of obtained afthe antecedent rule to support it. 2 Stra. 1055. ter he has gi-

ven the Gibbs was to have opposed it in the first instance. But plaintiff no-The Court said, that, according to the old established practice of trial. tice, wherever the defendant carries down the record to trial by proviso, he must obtain a rule, that, in case the plaintiff

should

(a) Ante, 492.

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Saturday, May 5th.

1787. The KI G against PIPPETT.

should make default, he might be at liberty to go to trial. But the only use of that rule is, that if two records are carried down to trial, (the one by the plaintiff, and the other by the defendant,) the former only should be tried. quite sufficient if the plaintiff has this rule at the trial. Besides, no inconvenience can result to the plaintiff from this practice; because, if the defendant do not carry down this record to trial after notice, he is liable to pay the plaintiff his costs.

And the master of the crown office informed the Court that in criminal trials, where the defendant carries the record by proviso, no such rule is obtained at all.

Rule refused.

Monday. May 7th.

# The KING against ANDREW ROBINSON BOWES.

RTICLES of the peace having been exhibited against the

defendant near two years ago by the Countess of Strath-

Upon articles of the peace exhibited, the Court have the power ' of requiring bail for such a length of time as they shall think necessary for the prethe peace, twelvementh. Where the court had at teen years, they afterwards lessened the its appearing in 5000l. to them that

pending

againt the defendant

more, his wife, he then entered into security for his good behaviour, by the order of the Court, for a twelvemonth. Soon after the expiration of that time, the defendant, and several others, under pretence of taking Ludy Strathmore to Lord Mansfield's at Caen Wood, by virtue of a warrant against her, got access to her, and, accompanied by several men armed, took her by force out of a house at noon-day, and carried her to Strickland Castle, in the county of Durham, and there deservation of tained her against her will for several days, till a habeas corpus was obtained, directed to the defendant, in consequence of confined to a which she was brought up to this court in Hilary term last; and then she exhibited fresh articles of the peace against the defendant, stating the above facts, and setting forth many circumstances of cruelty and ill treatment which she had underfirst required gone during her confinement, and while she was in the power bail for four- of her husband. At which time the Court, taking into their consideration all these circumstances, and above all, the outrageous breach of the public peace which had been committed by the defendant, ordered him to give security for the peace time to two for fourteen years, himself in 10,000/L and two sureties, each

An information was also granted against the defendant, and an informa- those other persons who were concerned with him upon that

tion was de-occasion.

Erskine.

on the same account, which must necessarily be determined within that time.

Erskine, in this term, moved for and obtained a rule to shew cause why the defendant should not be held to bail for one year instead of fourteen years, and why the sum which had The Kino been required should not also be lessened, upon an affidavit of the defendant, stating that he had found it impossible to procure bail to that amount and for that length of time. And, independent of the difficulty of procuring bail, he observed that there had been no instance since the Revolution in which sureties for the peace had ever been required for more than a year in cases of a like nature. In support of which, he cited the following examples: in Michaelmar vacation 4 Geo. 1. Archibald, Earl of Ilay, was bailed before a judge at chambers, to appear in court the first day of the next term, to answer articles exhibited by his wife; himself in 8000% and four bail in 4000% each. And on the exhibiting of the articles he was bound to keep the peace for twelve months. Michaelmas 8 Geo. 2. T. Brotherton gave security for one year upon articles exhibited by his wife: himself in 1000% and two bail, each in 5001. these articles contain a series of ill treatment for about eight months, the greater part of which time she was with child, and state that she was brought to bed before her time in consequence of her husband's ill usage, and that the child, died soon after in convulsions. But the Court required bail for the space of one year only, on the authority of three cases: one of the Earl of Stamford in the 7 Geo. 1. who was held to bail for the same time on the complaint of his lady, himself in 5000/, and two bail in 2500/. each. Another instance was the case of Colonel Bladen, who was bailed at the suit of Sir John Shardon, himself in 1000/. and two bail in 500/. The third was Colonel Onslow at the suit of Sir John Shadwell; the principal in 1000/, and his bail in 500/, each, both of these latter for the space of one year. In Hilary term 17 Geo. 2. Lord Vane was held to bail for one year; himself in 1000L and two bail, each in 500/ upon articles exhibited by his wife, whom he had seized and kept by force, in breach of a private agreement, and after she had been obliged to go abroad for some time in order to avoid him. Articles of the peace were exhibited in Trinity 21 G. 2. by Lady Lymington against her husband, wherein she set forth that, soon after she lay in, he beat her in to violent a manner that she was deprived of the use of her limbs, and that he had threatened to kill her; in consequence of which, the Court held his lordship to bail for one year, in 5000l. himself, and two bail in 2500l.

1787. against Bowss.

Bow Es.

each. And lastly, in Easter 30 Geo. 2. (a) Earl Ferrers was obliged to find security for a twelvemonth only; himself in The King 5000/. and two bail, each in 2500/. The circumstances of that case were much stronger against the defendant than the present. There is besides another reason for inducing the Court to lessen the time to one year; for a bill of indictment for perjury has been found against Lady Strathmore, founded upon the very articles now before the court.

Mingay and Law shewed cause against both the indulgences required by the rule. First, With regard to the quantum of the sum demanded: it appears to be by no means unprecedented from the case of Lord Ilay; for he was held to bail, himself in 8000% and four sureties in 4000% each; which besides being in itself a larger sum than that now demanded, must appear still more considerable, when the difference in the value of money at that time and at present is taken into the scale.

As to the term for which security is required, it cannot, from the nature of the thing, be guided by precedent; for each case must rest upon its own particular circumstances, of which the Court must judge at the time. This, being a much more aggravated case than any which has been mentioned, requires the Court to demand a much more lasting security than was necessary perhaps upon former occasions. A principal feature in the present defendant's situation is, that this is the second time he has been called upon to give security for his good behaviour towards the prosecutrix for repeated instances of cruelty; that therefore is an additional circumstance which ought to have considerable weight. instance, in which articles have been exhibited a second time. was that of Lord Ferrers. But though the term for which bail was required in that case was only for one year, yet much seems to have been done there by consent; and that point was not pressed by the counsel for Lady Ferrers. Excessive bail is a relative term; it depends upon the nature of the charge for which bail is required, upon the situation in life of the parties, and on various other circumstances. Considering the station of life in which the defendant is, this cannot be called excessive in respect of the sum; neither is it in respect of the term, because it is absolutely necessary for the preservation of the public peace. In all these cases, the power of requiring bail for any length of time is discretionary in the

(a) Vide 1 Burr. 635.

It is said in Hawk. P. C. c. 60. s. 15. that the court may require sureties even for a man's life.

It hath also been objected that no credit ought to be given The King to the truth of the articles, because an indictment for perjury is now depending against her on that account. But that is rather an aggravation of the injury; for if it should turn out to be a malicious prosecution, no action can be brought against the defendant by her. And, besides, that argument has never had any weight even on motions for new trials.

against Bowes.

1787.

Erskine and Chambre in support of the rule contended that by the bill of rights excessive bail ought not to be taken in any case; and that bail which was required to a larger amount and for a longer time than was essentially necessary for the preservation of the peace was excessive. The consequence of the Court's refusing the present application will be, that the defendant must remain in prison during the whole term of fourteen years; as it is expressly sworn that he cannot by any means procure bail for so great a length of time. As to the passage cited from Hawkins, it does not deserve much consideration; for he himself only states it as hearsay, and no authority whatever is adduced in support of it. Here it cannot be necessary to require bail for fourteen years; because an information is now depending against the defendant on this very account, which must be determined within a twelve-And if the defendant should be acquitted upon that information, it would be extremely unjust to require bail upon evidence which proves to be false: but if he be convicted, the court will then have an opportunity of imposing whatever punishment they think proper. It has been said that the circumstances in this case are unprecedented; but the case of Lord Ferrers was a much stronger one than the present. is well known with what barbarity he treated Lady Ferrers, having made several attempts to take away her life, and having insulted her in the grossest manner. There too he broke his first recognizance, by presenting a pistol to Lady Ferrers: but it is acknowledged that this defendant kept his; and therefore the transgression in that case was much greater than this. And when his Lordship was called upon to give fresh security the second time, he behaved with the utmost indecency in court; yet, even in a case so circumstanced as that was, the court on the exhibition of the second articles did not require bail for longer time than a twelvemonth. And that was not done by consent, as has been contended; for the consent there expressed only went to a permission to justify one bail till another could be procured. At all events,

against BowEs.

as the difficulty arises from the defendant's not being able to procure bail for so great a length of time, the court may re-The King quire bail only for a twelvemonth at present, and may afterwards renew it from year to year, as they shall see proper, without any fresh facts being exhibited against the defendant, upon the prosecutrix's declaring to the court that she does not think herself secure from the violence of the defendant.

ASHHURST, J. The circumstance laid before the court of an information being now pending against the defendant for the same charge must make great impression upon us in regard to the discretion which we may exercise in this instance. But as to the power of this court to compel persons against whom articles of the peace are exhibited to find sureties for a term exceeding one year, I do not entertain any doubt about For this court, which has a general authority to preserve the peace, has a right to require such bail and for such a length of time as will best answer the ends of public justice. It has been then said, that the court may require fresh bail at the end of a twelvemonth, and so from year to year as long as they should think necessary, without any fresh facts being exhibited against the defendant. But I very much doubt whether we have such a power: It has been admitted that there never was any instance of the kind; and I confess I should be very loth to establish such a precedent. The next thing urged is, that it is not necessary in this case to require security for more than one year, because the information which is depending against the defendant must necessarily be tried before the expiration of that time, and, in case he is found guilty of that charge, the court may require such bail, and inflict such punishment on him, as they may think proper; and that if he be acquitted, it would be very hard that he should be still confined on a charge, for which it will then appear that there was no foundation. That argument, I own, has great weight with me. For though I have no doubt of the power of the court, where articles of the peace are exhibited against any person, to require bail for what length of time they think necessary, not indeed by way of punishment, but as a security for the public peace, yet, in this case, as the ends of justice may equally be answered by shortening the time for which bail has been required, I shall have no objection to it. Therefore, if it were not for the circumstance of the information being now depending, I think the court should require security for the whole time. But that circumstance weighs very much with me; and as the information must necessarily be tried within a year or two, I think the security may be confined to two years.

As to lessening the sum required, no ground has been laid before the court to induce us to do it. The defendant stands charged with as daring an outrage as ever was committed in The King a civilized country. But as there may be some difficulty in procuring two bail for so large a sum as 5000/. each, I think he may be at liberty to substitute four bail in 2,500/. each,

1787. againet Bowes,

BULLER, J. The only point on which I have heaitated was, whether the term should be lessened to one or two years. For unless there be some delay on the part of the prosecution. the information will be tried within a year. The court are to look, not to the time when the information may be tried, but to the latest time when the defendant may be brought up to receive judgment. That will probably happen in the course of one year, but it may possibly exceed that time. And if the defendant should be acquitted within the time for which the recognizance is taken, the court will certainly receive an application to discharge it immediately.

As to the power of the court to require bail for a greater length of time than one year, I cannot entertain a particle of doubt about it. And in a case so outrageous as the present, and where the defendant watched the opportunity of discharging his former bail, the court would be highly justified in re-

quiring security for a much longer time.

GROSE, J. I am entirely of the same opinion.

The defendant on a subsequent day gave security for the peace for two years, himself in 10,000/. and two bail in 5,000% each.

# DOE on the Demise of FREELAND against BURT.

JECTMENT for a cellar and wine-vaults in Westminster, A demise of tried before Buller J. at the sittings after last term. The premises in defendant claimed under a lease from the lessor of the plain-late in the tiff of certain parts of a messuage situated on the West side occupation of Swallow-street, described to be one room on the ground of A. partifloor, and a cellar thereunder, and a vault contiguous and cularly desfloor, and a cellar thereunder, and a value contiguous and cribing adjoining thereto, and three rooms together with the ground them, part whereon the same now stand, and together with a piece of of which Vol. I.

ground was a yard, does not

pass a cellar situate under that yard which was then in the occupation of B. another tenant of the lessor. And the lessor in an ejectment brought to recover the cellar, is not estopped by his deed from going into evidence, to show that the cellar was not intended to be demised.

Dos against Burr.

ground on the North side, particularly describing it, with an exception of a right of way; and the whole were described to have been late in the occupation of  $\Delta$ . It was admitted that the vault in question was under this piece of ground which was a yard.

The defendant rested his title on the maxim that cujus est solum, ejus est usque ad cælum & ad inferos. The lessor of the plaintiff offered evidence to shew that at the time of the lease the cellar in question was in the occupation of B. another tenant; and therefore that it could not have been the intention of the parties that it should pass by the lease to the defendant; and that the defendant had not claimed it till after the expiration of that lease. The defendant's counsel objected to this evidence, because the lessor of the plaintiff was estopped by his deed from saying it was not meant to pass. But Buller, J. was of opinion that the evidence was admissible; and the plaintiff obtained a verdict, with liberty to the defendant to enter a nonsuit if the objection were well founded.

Mingay now shewed cause against a rule for entering a non-The evidence offered was not contradictory to, but in explanation of, the deed. It is evident that it was not the intention of the parties that the cellar should pass by the defendant's lease, because every thing which was intended to be leased was particularly described, and no notice is taken of the cellar. And the lessee enjoys premises which answer to every part of the description in the lease. Besides, the premises intended to be demised are described as late in the possession of A.; and this cellar was in the occupation of B. According to the description of the premises therefore the defendant has no claim to the cellar; unless he be entitled by the strict operation of law, for want of an exception of that which was not intended to be leased. And it is to be considered that in London and Westminster it is not unusual for landlords to let the buildings above ground to one tenant and those underneath to another; so that the strict rule of law cannot be applied to cases like the present. But a farther argument also arises from the circumstance of the cellar being in lease to another person, at the time when the defendant's lease was granted; so that the lessor of the plaintiff could not have granted it, even if he had wished so to do.

Bearcroft and S. Heywood, contra. The lessor of the plaintiff is stopped by his own deed from recovering these premises. For he is the lessor of the defendant as well as of the plaintiff; and whatever right any third person might have,

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he cannot dispute the defendant's title. The rule of hw is clear, and the question is as to the application of it. The principle is, that every grantor is estopped not only from saying that he did not grant, but that he had no estate in the premises. Now this ejectment is for a cellar which is locally situated under the ground, which it is admitted was demised to the defendant. And the lease passed every thing which was under it. But supposing the strict rule of law could not be applied to the present case, and that the intention of the parties could be enquired into, it is clear that the lessor of the plaintiff did not intend to except the cellar in the defendant's lease. For whatever was intended to be excepted is mentioned in the lease; there being an exception of a right of way. As to the defendant's not claiming till after the expiration of the other lease to B. that does not assist the right of the lessor of the plaintiff; for the same question of law still arises. And it was no objection to the lessor's granting

the cellar to the defendant because it was then in lease to B.; for perhaps the defendant was not to take possession till after

the expiration of the other lease.

Ashhurst, J. It appears plainly from the evidence that this objection is against the justice of the case. For it was not in the contemplation of the parties at the time of the lease to pass the cellar, and it appears that for three or four years after the defendant's lease the lessor of the plaintiff received rent from the former tenant of the cellar. The only question is, whether the Court are absolutely bound by the terms of this lease to put the construction on it for which the defendant contends. Now, it seems to me, that the construction of all deeds must be made with a reference to their subject-matter. And it may be necessary to put a different construction on leases made in populous cities, from that on those made in the country. We know that in London different persons have several freeholds over the same spot; different parts of the same house are let out to different peo-That is the case in the Inns of Court. Now, it would be very extraordinary to contend that if a person purchased a set of chambers, then leased them, and afterwards purchased another set under them, the after-purchased chambers would pass under the lease.

In the present case, considering the nature of this property, it was proper to let in evidence to shew the state and condition of it at the time when the lease was granted. Prime facie indeed the property in the cellar would pass by the demise, but that might be regulated and explained by circumstances.

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Doe agains Bung.

stances. Therefore I am of opinion, that, considering all the circumstances of this case, it was proper to receive the evidence offered at the trial, which, when received, proved that the cellar was not intended to be passed by the demise to the defendant.

Buller, J. Where there is a conveyance in general terms of all that acre called Black-acre, every thing which belongs to Black-acre passes with it. And there the rule, which has been mentioned, prima facie obtains. But whether parcel or not of the thing demised is always matter of evidence-Suppose the premises in question had been the inheritance of another person at the time of this demise, instead of their being in lease, they clearly would not have been parcel of this demise. Then their being in lease to another persons under this plaintiff cannot vary the question, whether parcel or not. In the next place, it is very clear, on inspecting the lease itself, these words cannot receive the general construction of the law. This is a lease of a part of a messuage, comsisting of one room on the ground floor, with a cellar thereunder: now if the argument for the plaintiff would hold, the cellar would have passed with the room on the ground floor, without particularly specifying it. Then a description of another part of the premises is, "of ground, together with three rooms which stand on it." Which shews that the parties have particularly described every thing which was intended to pass. Then follows a demise of the yard described with the same particularities, specifying the abuttals and the dimensions.

GROSE, J. This is a demise of premises in Westminster a and the question is, whether it appears to have been the intention of the parties to demise this cellar. But every thing which was meant to be demised is particularly described in the lease, and no notice is taken of this. It might as well be contended that a lease of an house in the Adelphi would pass the warehouses underneath. But it would be the greatest injustice to put the general construction of law on grants of the houses in that building; for we all know that those houses are held under titles entirely distinct from the cellars and warehouses underneath. And here the premises demised are described to have been lately in the occupation of A. and if the parties had intended that this cellar in question should have passed, it would have been described as being in the possession of B. But this cellar not being a part of the premises, nor appurtenant to them, did not pass under this lease.

Rule discharged,

### DAVIS against MAZZINGHI.

SEVERAL persons having been held to bail on affidavits, An affidavit stating that they had forfeited certain penalties within to hold to the lottery act (a) generally, without specifying any particular bail on the offence, and applications having been made to discharge them lottery act,

27th G. 3.c. on filing common bail,

z. should

ASHHURST, J. declared, that on consulting all the judges, specify the they were of opinion that a person could not be held to bail nature of the on a general affidavit that the party had incurred a penalty offence (c), and averthat within that statute; but that it was necessary to state the na- the detendture of the offence, as for insuring, &c. without specifying the ant has inparticular acts which constituted the offence.

The present defendant had been arrested for insuring tick-forfeiture: ets; and had applied to be discharged on filing common bail fence need on the insufficiency of the affidavit, which only stated that not be dehe had forfeited such a sum by insuring, &c. without stating scribed cirthat the defendant was indebted to the plaintiff, or that the debt ly, nor is the was still due.

plaintiff

Baldwin in support of the rule. Mingay, contra.

The Court were of opinion that the affidavit was sufficient. wear that The plaintiff could not take upon him to swear that it was a antisindebt due to him, because any other informer might have pre-debted to viously commenced an action against the defendant. And as him to the no person is entitled to the penalty till the process is actually the penalty. sued out, it was not a debt due to the plaintiff at the time of making the affidavit. Besides, the clause in the act of parliament is very general: it only directs that the plaintiff shall swear to the amount of the penalty sued for, without making mention of the debt; and here the plaintiff swore to the forfeiture, which is the cause of action.

Rule discharged (b.)

(a) 27 G. 3. c. 1. (b) 3 Burr. 1569. (c) Vide Watson v. Shaw, post 2 vol. 654; & Holland v. Bothmar, post. 4 vol. 228.

DOE on the several Demises of ELLIS and MEDWIN Tuesday, May 8th. against SANDHAM.

E JECTMENT for a house and garden at Horsham in Under a Sussex tried before Thomson, Baron, at the last assizes power to a for Sussex; verdict for the lessors of the plaintiff, subject to life to lesse the for years,

reserving the usual covenants, &c. a lease made by him, containing a proviso, that in case the premises, were blown down or burned, the lessor should re-build, otherwise the rent should cease, is yoid; the jury finding that such covenant is unusual.

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Dos against SANDHAM.

the opinion of the court on a case stated. Henrietta Ellis be ing seized in fee of the premises in question, by her will dated 11th February 1783, gave and devised the same uno her brother H. Ellis, for life, without impeachment of waste; and after his decease, in case he died without issue, then m John Ellis, one of the lessors of the plaintiff, upon trust w sell the same for certain purposes therein mentioned. Is which will is contained the following proviso; "Provided " also, and my further will and meaning is, and I do hereby ap-" point that it shall and may be lawful to and for my said bro " ther H. Ellis, from time to time during his estate for life " in the respective hereditaments and premises aforesaid, by " indenture under his hand and seal to demise or lease the " same or any part thereof to any person or persons, for any "term or number of years not exceeding twenty-one year, " to take effect in possession, and not in reversion, or by way " of future interest; so as in every such lease or less: "there be reserved and made payable half yearly, during " the continuance thereof respectively, the best and most ex-" proved yearly rent or rents that can or may be gotten for the " same without taking for any such lease or leases any fore, " premium, or foregift; and so as none of the said leaves ke " made dispunishable of waste; and that in every such lease " there be contained usual and reasonable covenants, and a " clause of re-entry for non-payment of the rent or rents there-" by to be reserved; and so as the respective lessees execute " counter-parts of such leases." Henry Ellis, pursuant to the power reserved to him by the foregoing proviso, by indenture of lease, dated 1st of April 1785, demised the house and premises in question to W. Sandham (the defendant), his executors and administrators, for twenty-one years, under the yearly rent of 121. payable at Michaelmas and Lady-den; in which lease is contained a covenant on the part of the lease, " to keep the premises in tenantable repair (accidents by fre " or tempest excepted), and to yield them up at the empire " tion of the lease to the person entitled, without committing " any waste, spoil, or destruction." The lease also contained the following covenant on the part of H. Ellis the lesser; "And also, that in case the said demised buildings and pre-"mises, or any part thereof, with the appurtenances, shall " be blown down by violent storms and tempests, or burned "down by lightning, or other accidental fire, during the said "term, that then the said H. Ellis, or his assigns, or the " person or persons who for the time being shall be entitled " to the freehold and inheritance, his or their heirs and 2 signs

"signs, shall and will repair or re-build the same immediately, "or in default thereof, the said W. Sandham, his executors, &c. "shall be at liberty to quit the aforesaid premises, and be forth-"with discharged from payment of the yearly rent aforesaid." H. Ellis died in November, 1785. In June 1786, John Ellis sold the premises in question to T. C. Medwin, the other lessor of the plaintiff, for 300l. The jury found that the rent reserved by the lease was an adequate rent for the premises in question; and also that the first covenant was an usual covenant on the part of the lessee; but that the last covenant was an unusual and unheard-of covenant on the part of the lessor. The question is, Whether the lessors of the plaintiff are entitled to recover?

Dor ugainst SANDHAM.

Hurst, for the lessors of the plaintiff. The question is, Whether the insertion of the second covenant, which the jury have found to be unusual, does not render the lease void? It must be admitted as an universal rule, that all acts done under a particular power, which in their consequences may affect the rights of third persons, must in all substantial points be strictly and pointedly warranted by such power; otherwise they are void. 5 Co. 4. In Taylor dem. Atkins v. Horde (a), where one of the questions was respecting the validity of a lease executed under a special power, Lord Mansfield said, "the intent of parties, who gave the power, ought to "govern every construction. He to whom it is given has a "right to enjoy the full exercise of it: they, over whose es-"tate it is given, have a right to say, 'it shall not be exceed. "ed.' The condition shall not be evaded; it shall be strictly "pursued in form and substance; and all acts done under a "special authority, not agreeable thereto, nor warranted "thereby, must be void (b)." It becomes, then, material to consider whether this power has been pursued in the present case. It is required that the rent shall be payable half-yearly during the whole term; that the lessees shall be punishable for waste; and that in every lease there shall be contained the usual and reasonable covenants. Now the second covenant provides, that in case the premises shall be blown down or destroyed by fire, the lessor shall immediately rebuild, otherwise the lessee shall be discharged from the payment of rent. This lease is therefore void, because it contains a proviso totally repugnant to the power under which the lease is granted. And according to the generality of this covenant,

(b) 1 Burr. 120.

(a) I Burr. 60.

Doe agunt Sandham.

covenant, if any part of the buildings, as for instance, a chimney, be blown down, the rent would cease. The covenant is likewise contradictory to the power in another respect: the power expressly requires that the rent shall be reserved during the whole term; but the lessee, on a certain event, is not to pay any rent. In the next place, the covenant makes the tenant dispunishable of waste; whereas he would otherwise be liable. So that the reversioner is in a worse situation than he would otherwise have been. And though by the 6th Ann. c. 31. the tenant would not be punishable for waste in the case of accidental fire, still he must at all events pay rent during the whole term. And as he is exempted from that by the lease, it is void.

Mingay, for the defendant. The question is, What effect this covenant will have in the situation in which these parties now are? In the first place, the event has not happened which would occasion the inconvenience. Usual and reasonable covenants mentioned in the power must mean usual and reasonable covenants on the part of the lessee : but this is a covenant made by the tenant for life. And though it would be void as against the reversioner, at least the tenant for life might make such a covenant to bind himself, it being only to his detriment. Suppose this covenant had not been inserted in the lease, the parties would have been precisely in the same situation in which they are under the covenant; for in case the premises had been blown down or burned by fire, the tenant would not have been obliged to rebuild or to pay rent. In such a case, a court would grant relief. In Brown v. Quilter (a), the premises being burned down, a bill in equity was filed by the tenant to restrain the landlord from bringing an action at law for the rent due subsequent to the time of the accident, and Lord Northington said, " Here no action at law is brought, and therefore no relief is necessary. But if an action be brought, this court will restrain the landlord from proceeding to recover rent until the house is rebuilt." In the case of Steele v. Wright (b), it was decided, that though the landlord is not bound to rebuild, yet the tenant is neither obliged to rebuild, or to pay rent till the premises are rebuilt. As far therefore as respected the tenant for life, he had a right to bind himself by this kind of lease; and as a court of equity would have compelled him to do what he has covenanted to perform, the covenant is not unreasonable. At all events, however, if the Court

<sup>(</sup>a) 1st June 1764, car Lord Northington. Since reported in Ambl. 619. (b) Car. Lord Apoley, 1773.

should be of opinion that the words of the power extend to anusual and unreasonable covenants on the part of the lessor, and that this comes within that description, yet the covenant may be rejected, and the lease itself supported in other respects.

Doz

ASHHURST, J. A lease must be either good or bad in its creation. Here the particular terms, under which the power is given to the tenant for life, are prescribed in the power it-He has the power of granting leases, provided the usual covenants are inserted: but here it is expressly found that the covenant in question is unusual. Then the question is, whether this avoids the lease itself, or only that particular covenant? It being expressly required that the tenant should execute his power in a particular manner, that becomes a condition precedent, and if it be not complied with, the power never arises. In truth, he has no power to lease at all, unless it be executed in the form prescribed. Here it is manifest that the lease was not made pursuant to the power, for it is not in the usual form. This lease was void in its creation, and the reversioner has a right to take advantage of it. Many cases have decided the present question, and particularly one from the Oxford circuit; there, an improper covenant was inserted in the lease, executed under a special power, which it was determined avoided the lease itself.

BULLER, J. In the case of leases made by a tenant for life, who has a special power of granting leases for a longer term than his own life, upon his death the lease is void, un. less he has strictly pursued the power. In the present case, the Court are relieved from determining whether this covenant is or is not usual; because the jury have expressly found that it is unusual. It has been argued, that the covenant only is void; but the same reason which avoids the covenant vacates the lease itself, because it is not warranted by the power under which it was granted. The defendant's argument, if it prove any thing, proves this, that no lease executed under a power could be bad except from the omission of some covenant required; because each covenant which is contrary to that power might be rejected. But that would be contrary to all the adjudged cases on the subject. The lease must be taken to be good or bad on the face of it. Now this lease, on the face of it, imports to bind the reversioner as well as the tenant for life. But, inasmuch as the tenant for life has exceeded the power, the lease cannot bind the reversioner, and is therefore void. Another argument, which has been Yууу Vol. I.

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used for the defendant, is likewise without foundation. a lessee is obliged to pay rent, even though the premises should be burned down. Those cases in equity therefore must have turned upon particular circumstances. Mr. J. Buller then read the case of Pindar v. Ainsley and Rutter (a). GROSE, J. Of the same opinion.

Postea to the plaintiff.

(a) Ante 312.

Wednesday, May 9th.

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#### GRIFFITHS against WILLIAMS.

Paying mo-HIS was an action against the defendant as an attorney, ney into for negligence in not entering up judgment on a warcourt where rant of attorney against a debtor of the plaintiff, by which he the demand had lost his security. The defendant pleaded the general is for unliquidated da- issue, and afterwards obtained a judge's order for paying judge's order money into court. Notice was given to the defendant by the plaintiff's attorney that the payment was irregular, and that after a plea pleaded, is he should not take it out of court; but about ten days before irregular: the trial the plaintiff's agent took the money out of court, and but if the plaintiff take afterwards the plaintiff obtained a verdict for the exact sum paid into court. the money out, he there-

On a former day Bower obtained a rule to shew cause why the verdict which had been given for the plaintiff should not

be set aside, and a verdict entered for the defendant.

Douglus and Milles now shewed cause, and contended that, as this was an action in which unliquidated damages were claimed, the defendant could not pay money into court as of course. But even if he could, this was too late, it being after plea pleaded. 1 Wils. 157. Barnes, 279. And that irregularity is not cured by the plaintiff's agent taking the money paid in. guilarity is not cured by the plaintiff a agent taking the money.

The plaintiff out of court; for the plaintiff cannot be in a better situation. is bound by by those means than he would have been if the defendant's attorney had paid the money into his hands. And even in that case, unless there had been a plea puis darrein continuance, ney's agent the plaintiff must have obtained a verdict. For nothing can be taken advantage of under the general issue but that which happens before plea pleaded. Sullivan v. Montague, Dougl. Reynolds v. Beerling, Dougl. 108. n. 47 (a). Besides, the agent's taking the money out of court ought not to conclude the plaintiff, after his attorney had expressly given notice to the defendant's attorney that he would not take the money.

The

The counsel in support of the rule were stopped by the Ashnurst, J. This payment of money was originally ir- GRIFFITHS

regular; for this is not one of those actions in which money williams. could, strictly speaking, be paid into court: but that irregularity was waved by the plaintiff's taking it out of court. He should have applied to discharge the rule as irregularly obtained; but instead of that he received the money which was paid into court, and went down to trial. It is no objection that the agent in town took the money out of court, because he acted as the plaintiff's attorney in town; and therefore the

plaintiff is concluded by his acts.

BULLER, J. Where the defendant is entitled to pay money into court, it is a matter of course before plea pleaded; and now, even after plea, it is perpetually done by obtaining a judge's order for that purpose. No inconvenience ensues to either party from this practice; because if any expence has been incurred, that is ordered to be paid at the time of obtaining the rule. And this tends to the furtherance of justice; for if the defendant pay into court what is really due, the plaintiff ought in justice to take it. That is the case in general. It is true indeed that the defendant in this action could not in strictness pay money into court, because it is founded in damages: but if the plaintiff had intended to object to it, he should have applied to discharge the rule. he has acquiesced under this order by taking the money, and therefore is estopped from saying that the defendant could not pay money into court. It has been said that this is to be considered in the same light as if the defendant had, after plea pleaded, actually paid so much money to the plaintiff as a satisfaction; in which case, unless there had been a plea puis darrein continuance, the plaintiff would have been entitled to a verdict. But this is extremely different from that case; for there the payment would be the act of the party, but this payment under a rule obtained is the act of the Court, and therefore could not be pleaded puis darrein continuance. Then as to the agent's taking the money out of court, it is the same as if it had been done by the plaintiff himself. For where there is an agent in town, all notices are given to him, and are not sent into the country.

GROSE, J. Here the objection, if good, is waved. For the plaintiff is estopped, by taking the money out of court, from taking advantage of any irregularity. There was time enough for the agent to have written into the country, after

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he

1787, he had taken the money out of court; and, after that, the

plaintiff ought not to have proceeded to trial.

The Court made the rule absolute; directing that the plan GRIFFITHS against tiff should have costs to the time of the money being paids Welliams. to court, and that he should pay the defendant the subsequent costs (a).

> (a) Ante 629. Sed vid. Stevenson v. York, p. 4 vol. 10.; & Kabell v, Halm ib. contra as to costs.

Wednesday, May 9th.

#### GOODALL and Others against DOLLEY.

If the indorsee of an inser, the indorser will subsequent to pay the ments made without knowledge want of notice.

THIS was an action by the indorsee of a bill of exchange against the indorser, tried before Heath, Justice, at the iand bill, "or last assizes at Warwick. The bill, which was dated on the it for accept-4th of November 1786, was drawn by one Lutwych on Jis ance, which Rutter, in favour of the defendant, and payably sixty-fiveday is refused, after date. The defendant indorsed it to the plaintiffs. The and delay gi-after date. ving notice bill was tendered for acceptance by the plaintiffs to Rusera The first advice to his indor- 8th of November, who refused to accept it. given of this refusal by the plaintiffs to the defendant, was y be discharg. a letter dated the 6th of Junuary following, which only mened. And a tioned generally the return of the bill, without specifying the time or circumstance of the tender of the bill to Ruster, and proposal by his refusal. The bill expired on the 11th of January, and on the next day, the defendant made a proposal to one of the bill by instal-plaintiffs to pay the bill by instalments. Heath, Justice, was of opinion, that as this proposal was made under an ignorance of all the circumstances of the case, which it was material for of the indor- the defendant to know, he was discharged by the lacker of see's laches, the plaintiffs; and, in consequence of that direction, the just is not a wai- found a verdict for the defendant.

A motion was made by Lee for a new trial on two grounds; First, That as notice in this case could not have been of any service to the defendant, inasmuch as Rutter was insolvent when the bill was refused acceptance, it was not necessary w give notice before the bill became due, and the indorser still continued liable. Secondly, supposing he might once have taken advantage of the plaintiff's laches, yet he had waved that advantage by his subsequent promise.

Balguy shewed cause. As to the first point; it is perfectly clear that the plaintiffs, if they meant to resort to the deferdant, should have given immediate notice to him of the bill's being dishonoured; instead of which, they suffered a long space of time to elapse, by which neglect they have discharged the As to the other point; the defendant cannot

against DOLLEY.

be said to have made himself liable by his subsequent con- 1787. duct; for, if that were so, the same reasoning would have govormed the case of Blesard and Hirst (a), where there was an Goodala absolute promise to pay. That therefore was much stronger than the present; for here the party did not absolutely say that he would pay the bill; but, under an ignorance of all the circumstances, he proposed to pay it by instalments. This then at most was only a conditional offer, and not being accepted, was the same as if it never had been made.

Lee and Dayrell in support of the rule. The case of Blesard and Hirst was materially different from the present; for the ground of that decision was, that if notice had been given. it would have been extremely material, as the drawer continued in credit for three weeks after the bill had been dishonoured. But here it was utterly impossible that notice could have been of any service whatever, for the defendant being the only indorser, could not have resorted to the drawer; for in truth he became insolvent immediately after the bill was tendered for acceptance. But supposing the neglect of the plaintiff had at one time discharged the defendant from payment, yet he made himself subsequently liable by his offer to pay. And no argument can be drawn from the silence of the Court in Blesard and Hirst, for that point was never mensioned even in argument; but if it had been urged, it would have been decisive in favour of the plaintiff.

The plaintiff's counsel also offered to procure an affidavit, that the drawee had no effects of the drawer in his hands at the time. But as to this, the Court were of opinion that, as between these parties, that would make no difference.

ASHHURST, J. The case of Biesard v. Hirst goes the whole length of deciding the present. It was there determined that though it was not necessary that the holder should present the bill for acceptance before it became due, yet if he do, he must give immediate notice to the person from whom he received the bill in case it is dishonoured. Here such notice was not given, and therefore the defendant was discharg-But then it is said that he made himself subsequently liable by his proposal to pay the bill by instalments, which amounted to an acknowledgment of the debt. That argument might as well have been urged in the case of Blesard v. Hirst as the present, if it had been thought material. For there the indorser absolutely premised to pay the bill on his return

(a) 5 Bur. 2670.

GOODALL against Dolley.

return from Leeds; but, on his being apprized that he was not bound by law, he refused. And yet that was not held as a waver of the want of notice. That indeed was a stronger case than the present; for here the defendant only made a conditional offer to pay by instalments, which, being rejected, put matters in the same situation as if no offer had been made. The defendant then had a right to stand on the strict rule of law; and by law he is not bound to pay.

BULLER, I It is rather extraordinary that in the case of Blesard v. Hirst, it should have been made a doubt whether notice of non-acceptance, in the case of an inland bill of exchange, was necessary to be given to the drawer. For it had long been settled that notice was necessary to be given in the case of foreign bills. But no mention is there made of the want of notice being waved by a subsequent promise; and that was a much stronger case than the present; for there there was an express promise to pay by the indorser: but in this case there was only a conditional promise, which was made by the defendant under a total ignorance of all the circumstances relative to the bill having been dishonoured. is an answer to an action against the indorser. But if the action had been brought against the drawer, I should have been willing to let in the affidavit to shew that the drawer had no effects in the hands of the drawee. That would be like the case of Bickerdike v. Bolman (a). If A. draw on B. it must be taken prima facie that he has effects in his hands; otherwise he has no right to draw on him: but if the drawer has no effects in the hands of the drawee, he cannot be injured by want of notice that the drawee will not pay.

GROSE, J. If there be any difference between the case of Blesard v. Hirst and the present, it is in favour of this defendant. For at the most, this was only a conditional offer to pay, but that was a positive promise by the defendant to take up the bill as he returned from Leeds. That case, therefore, being precisely in point, must govern the present.

Rule discharged,

(a) Ante, 405.

1787.

#### BIRCH against SHARLAND.

Friday, May 11th.

THE defendant being in execution at the suit of the A bond and plaintiff in September 1785, a commission of bankrupt warrant of issued against him, and he was declared a bankrupt. Soon afconfess ter, in order to regain his liberty, he gave the plaintiff a bond judgment, and warrant of attorney to confess judgment for the old debt. given by a That bond and warrant of attorney having been put in force, bankrupt after his banktupt bediendant obtained a rule to shew cause why he should ruptcy in or not be discharged out of execution, having obtained his cert der to obtain tificate, upon the grounds that the bond and warrant of attor. his liberty, is not barred by his certite when they were executed; or supposing they were valid, the ficate, although the war and the first should be the original debt was

Mingay shewed cause. As to the first objection, the case contracted of Fell and Riley (a) is decisive. It is there said, that the rule before. And of Easter Term, 15 Car. 2. which requires that an attorney if the obligor on the part of the prisoner should be present when a bond were in cusand warrant of attorney are executed by him, only relates to ed in execupersons in custody upon mesne process. With respect to the tion, it is not second ground, the old debt was extinguished, and a new connecessary sideration arose upon which the bond and warrant of attorney that an atterpretation were given, which operated as a new debt. That therefore, should be being subsequent to the bankruptcy, could not be proved unpresent, on this part, at

Baldwin, in support of the rule, abandoned the first ground; the time of but contended, that the giving the bond and warrant of attor-the bond ney to confess judgment for the same debt, and to the same and warrant, plaintiff, did not raise a new debt, and therefore might have been proved under the commission.

Per Curiam. This certainly is to be considered in the light of a new debt arising upon a new consideration, because the bond and warrant of attorney were given in order to procure the defendant's liberty. The old debt was thereby extinguished. That point was determined in the case of Vigers and Aldrich (b), and in Jacques and Withy in the Term Reports (c). This is the same as if a new promise had been given for the same debt upon the same consideration, even

(a) Cowp. 281. vid. 2 Stra. 1245. S. P. (b) 4 Burr. 2482. (c) Ante, 559.

BIACH

1787. after a certificate obtained which would operate as a new debt, because the old debt still remained in equity.

Rule discharged (a).

againet BHARLAND.

(a) Vide post. Parkinson v. Caines, 3 vol. 616. as to execution of bond and warrant by a prisoner.

Friday, May 11th.

### MACKENZIE against MACKENZIE.

fidavit, Bower obtained a rule to shew cause why he

An affidavit THE defendant having been arrested on the following af-to hold to fidavit, Bower obtained a rule to shew cause why he bail, stating a promiec made to the defendant without effect; theredefendant ೮c is not sufficiently positive.

should not be discharged on filing common bail. The affidamade by the vit was in the following terms: That the plaintiff's sister, A. defendant, executor, &c. Anderson, by her will, gave and bequeathed unto the plaintiff executor, &c. 1001. and directed that the same, with the other legacies, ey of root. he should be paid immediately after her death, and made the queathed by plaintiff's daughter residuary legatee. That the plaintiff's his testatrix daughter, after proving the will, married the defendant, and confess. and confess to in September 1785 the plaintiff received a letter from the dethe amount of fendant, containing (as the defendant mentioned in the letter) 280l. but that plaintiff a copy of the testatrix's will; in which copy, which was written by the defendant, it was stated that the legacies were to the said sum, be paid at the expiration of twelve months after the death of caused sever the testatrix, and not immediately after that event, as the rel applicati- truth really is. That, in the same letter, after stating securities belonging to the said testatrix to the amount of 280% in his custody, the defendant promised to pay the plaintiff his legacy of 1001 in May following. That the plaintiff, not refore that the ceiving the said sum, caused several applications to be made to the defendant for payment thereof without effect; therefore was indebted, the defendant is justly indebted to the plaintiff in the sum of 100l. for the reasons herein-before mentioned. Chambre shewed cause, and contended that the affidavit,

was sufficiently positive to hold the defendant to bail. In Moultby and Richardson (a), an affidavit that the defendant was indebted to the plaintiff in such a sum as he computes it, was held sufficient. This affidavit is more certain, for the defendant not only swears positively to the debt, but also

shews the foundation of it.

Ashhurst, J. An affidavit to hold to bail must be positive, and nothing ought to be left to be collected by inference. This affidavit is not sufficiently positive as to the debt, but it should have stated in addition that the sum was still due and unpaid. If it had so done, I should have held it sufficient.

BULLER.

1787.

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against

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BULLER, J. ... There is a difference between the practice of this court and that of the Common Pleas. In this court the affidavit must be positive as to the debt: But there the defendant is suffered to file a cross affidavit, and the plaintiff may afterwards file an additional one, in order to supply the defects of the first. Therefore as no cross affidavit is permitted to be filed in this court in answer to the plaintiff's, it is absolutely necessary that the affidavit on which the defendant is held to bail should be positive. Now, in this instance, the plaintiff does not swear that the debt is still due; it may be true, that he made several applications without effect and yet it may have been paid afterwards. This Court are so strict in construing affidavits to hold to bail that in one instance they held an affidavit, that the defendant was indebted to the plaintiff in 5000l. for money had and received, and for which he had not accounted, to be insufficient; which was a much stronger case than the present: and if I am not mistaken, the case which was cited at the bar has been since over-ruled. An affidavit to hold to bail must be as strong and positive as an affidavit to change the venue. The cases of assignees, executors, &c. (a) are exceptions to the general rule. are permitted to swear as to their belief only, which from the nature of their respective situations, is as much as they can do. Per Curiam, Rule absolute (b).

(a) Vida Sheldon v. Baker, ante, 83. (b) Vide H. Bl. R. C. B. 245; & Wheeler v. Copeland, post, 5 vol. 364.

#### TURNER and Others against PEARTE.

Friday, May 11th.

mill of the plaintiffs, situated within the manor of tion to the Leeds, which suit they claimed as lords of the said manor, competency of with defendant at the trial before Mr. Baron Perryn, at the discovered last assizes at York, set up an exemption as being situated after a trial within the manor of Whitherk cum membris, which was part is not a sufficient of the possessions of the knights of St. John of Jerusalem, ficient ground of the tenants of which manor had always been exempt from itself for doing suit to the mill of the lord of the manor of Leeds. It granting a appeared that the manor or Whitherk extended into the manor new trial: but it may have some Vol. I.

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where the party applying appears to have merits.

TURNER against PEARTS.

the houses in respect of which this exemption was claimed were situated within that part of Whitherk, and were distinguished by the mark of a cross. The jury found a verdict for the defendant; and a new trial was moved for, this term, upon two grounds: First, That it was a verdict against evidence. Secondly, Upon an affidavit, that it had been discovered since the trial that five out of nine of the witnesses on the part of the defendant were interested in the event of the cause, and therefore were incompetent, and ought not to have been received. The ground of their incompetency was stated to be, that they contributed towards the relief of the poor of Leeds, and that the overseers of the poor had contributed twenty guineas towards carrying on this suit in respect of the work-house, which was one of the St. Yohn's houses, and claimed a similar exemption. In answer to this, an affidavit was made by those witnesses, that they did not know of this subscription at the time they gave their testimony.

Cockell, Serjeant, Wood, and Topping, shewed cause against the rule; and as to the second objection, they contended that it came too late, even if it were entitled to any consideration at all: For in strictness no person could be objected to as an incompetent witness, after he had been sworn in chief. In Abrahams and Bunn (a), where a witness was not objected to till after his examination, Lord Mansfield said, "in strictness, the objection comes too late after he has been sworn in chief. examined and cross examined. The strictness of law, in this respect, is very wise and ought to be adhered to, for the relaxation may be abused, and must always occasion waste of time." But at all events, supposing the objection could be gone into, some of the most material witnesses did not know that the houses to which they belonged did contribute towards the general fund at the time that they gave their evidence: So that all objection, in point of interest, is entirely done away from them, and there were others who had no in-

Chambre and Law, in support of the rule. If a witness has an interest in the cause, however small or remote, that will render him incompetent. Here the witnesses not only claimed a similar exemption in respect of the poor-house, but likewise contributed to the defence of this action. In the case of Abrahams and Bunn, Lord Mansfield was only stating what

terest whatever.

(a) 4 Burr, 2252.

had been the ancient doctrine in respect to witnesses; and he tertainly did not intend to recognize it in its fullest extent, for he says that it had been relaxed in modern times, and, in that instance too, he held the witness to be competent; therefore it was decided on another ground.

TUR ER against Paarts.

The Gounsel on each side also argued this case upon the merits; as to which, the Court being of opinion that the weight of evidence was in favour of the verdict, they also discharged the rule on that ground; but they first gave their opinions upon the other point.

Ashnurst, J. The regular time for objecting to the competency of witnesses is at the trial. The ancient doctrine on this head was so strict, that if a witness were once examined in chief, he could not afterwards be objected to on the ground of interest. Perhaps that strictness may in some degree be relaxed by the custom of suffering witnesses to be examined conditionally, which is only waving the objection for the time. But still the objection must be made at the trial. Besides, the affidavit on the part of the plaintiffs is answered as to the bias which might be supposed to be on their minds; for they swear that they did not know of any subscription at the time of giving their evidence.

BULLER, J. There has been no instance of this Court's granting a new trial on an allegation that some of the witnesses examined were interested; and I should be very sorry to make the first precedent. Anciently, no doubt, the rule was, that if there were any objection to the competency of the witness, he should be examined on the voir dire; and it was too late after he was sworn in chief. In later times, that rule has been a little relaxed; but the reason of doing so must be remembered. It is not that the rule is done away, or that it lets in objections which would otherwise have been shut out. It has been done principally for the convenience of the Court, and it is for the furtherance of justice. The examination of a witness, to discover whether he be interested or not, is frequently to the same effect as his examination in chief: So that it saves time, and is more convenient to let him be sworn in chief in the first instance; and in case it should turn out that he is interested, it is then time enough to take the objection. But there never has yet been a case in which the party has been permitted after trial to avail himself of any objection, which was not made at the time of the examination. But in the present case there is not the least foundation for this Court to interpose; for it cannot be said that the witnesses

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TURNER against PRARTE.

nesses were swaved by this interest in the least degree. I de not say that it might not have been a ground to object to their testimony on the trial, supposing the whole of what was suggested by the plaintiff was true: but it would have been necessary to have determined another question first, Whether the houses in respect of which the witnesses are supposed to be interested were really houses formerly belonging to the knights of St. John of Jerusalem, before any decision could have been made on their competency? but at any rate we will not permit them to make the objection now. Where it appears that one or more material witnesses who were examined on a trial were interested, it may afterwards weigh with the Court as a circumstance for granting a new trial, provided the merits of the case are doubtful; but as a substantive objection. I am clearly of opinion that it ought not to be allowed.

GROSE, J. As to the competency of the witnesses. it is not contended that in point of law we are bound to reject their testimony now. This then is an application to our discretion; and the question is, Whether that should induce us to reject their evidence after yerdict? If this objection had been made before me at the trial, perhaps I might have ad. mitted it; but then, by the rule of law, objections of this nature must be made at the trial. And, if the plaintiff will insist upon the strict rule relative to the incompetency of witnesses, the defendant has an equal right to avail himself of the rule that the objection now comes too late. Formerly the rule was to examine on the poir dire; that indeed has been relaxed. But this application requires us to go farthers and the affidavit states no sufficient grounds in support of in In the first place, it does not clearly appear that the plaintiffs did not know of the objection at the time of the trial. It is sworn very loosely; and if they knew of it at that time, that would be a decisive reason for refusing to allow it now. However, although no new trial has ever been granted on such an objection, I do not know but that if a proper affidavit were made, it might have some influence on my mind, where the party applying has merits; but here the weight of the evidence is in favour of the verdict.

Rule discharged.

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## The KING against JOHN HOGG.

Soturday, &

THE defendant having been rated to the poor for "the A house and engine-house," appealed to the court of sessions at Lan-engine for easter, who confirmed the rate, and stated the following case ton, which for the opinion of the Court.

"Fohn Hogg was rated to the relief of the poor for a build- one entire "ing called The Engine House, which consists of a bay of audject, and building about eighteen feet long and nineteen wide, in by the ge"which there is a carding machine for manufacturing cotton, neral name "The engine is not fixed to the premises, but capable of beof an enginebouse, are "ing moved at pleasure. The building, independent of the rateable to 
"machine, is worth only two guineas per annum, for which the poor. 
"the appellant is willing to be rated. The building and maThe usage 
"chine together are rated at 361. The usage of the town of of a particular place 
"Ribehester has been not to rate personal property." 
"cannot con-

This case was argued in this court last Hilary Term: but trol the opethe Court wishing to be satisfied in some further particulars ration of a respecting the premises rated, directed the following rule to tute. Cald, be served on the justices:

266. S. C.

"Upon hearing counsel on both sides, it is ordered that "the order of sessions in this case be sent back for the justimes to hear evidence, and state to this Court, Whether the engine mentioned in the said order be worked with water or with hands? and whether the house wherein the said engine stands be a dwelling-house, or built for the purpose of receiving the engine? and whether it be used for any other purpose than working the engine? and in what manners the engine is put up in the engine-house? and what is its size and bulk? and also whether the owner of the building has contracted to discharge the occupier from all taxes?"

To which the sessions returned the following answers:

"That the engine therein mentioned, is generally worked with water, but frequently by the hand. That the building wherein the said engine stands is not a dwelling-house, nor was it erected for the purpose of receiving the engine, but formerly was used for the purposes of turning bobbins, and as a weaver's shop, and is now used for the purpose of cartrying on the cotton manufactory, there being in the same building two other engines besides the engine before menitioned, worked as aforesaid; one of which is also used for

against Hocc.

"the purpose of carding, and the other for tumming com "which tumming is another process of the same manual The King " tory. All the engines are placed on the floor, and now. " annexed or fastened to the same, but may be moved at pa " sure, and carried out and worked in any other place, ent "by means of water or manual labour, and are not adapt " to any particular building. The frame, in which the engi " stands, is twelve feet in length, three feet eleven inches " breadth, and two feet nine inches in height, the semisi " meter of the largest cylinder, with a small roller at the m " rising twenty inches above the frame; the engine sinks "in the frame seventeen inches. Leonard Walmeley is the "lessee of the premises under the owners, and is subject t " his lease to discharge the premises from all taxes. As " Hogge the appellant is the undertenant: but Walmsley pay " the taxes."

> Caldecott, in support of the order of sessions, contends that though the amended case was still defective, and the questions stated by the Court evasively answered, yet the sufficient appeared on the case to enable the Court to a judge that this was a species of property rateable to the por First, The engine-house, consisting of the engine and the building (which form together one undivided subject) rateable to the poor under the 43 Eliz. c. 2. s. 1. Second The engine itself, independent of the house, as producing certain annual profit without any risk, is liable to be rated t

the poor.

As to the first; the case states that this property is rate as a house called the engine-house, that this is not a dwd ling-house, and that the use to which it was formerly applied was similar to the present. The house is merely a case to the engine, and would be of no use without the engine. engine gives name to the house, and the house and the en gine together form one entire subject. It is only stated at gatively in the case that the engine is not fixed to the for but for any thing that appears to the contrary, it may be fixed to some other part of the building; and, as it is worked by water, it must in some sort be fastened to the building. It some respects this is similar to a mill, where the mill and the house are considered as an entirety. It appears by the cast that Walmsley is the lessee of the premises; which must com prehend the engine as well as the house: And as he is to pay all the taxes, this cannot be said to be a tax on labour, since the building is in the hands of an undertenant. The case of St Nichola

Tichelas Gloucester (a) is immediately in point. There the ourt said, that the house was built for the machine, and not he machine for the house. It did not appear in that case that The King he machine was part of the house, but only that it was in the

against Hogg.

(a) The King against the Churchwardens and Overseers of St. Nicholas, Cald. 262. GLOUCESTER. E. 23 Geo. 3 B. R.

The case stated that the mayor and burgesses of the city of Gloucester, about we years ago, were possessed of and entitled to a house in the parish of St. Vicholas Gloucester; and, being so possessed, erected a machine in a street leadig by the said house, for the purpose of weighing waggons, carts. &c. with oals and other things, and have received at the rate of 2d. per ton for all goods reighed. That the steel-yard, part of the said machine, by which the wagons. &c were weighed, was and always hath been in the said house; and the aid house is called the Machine-House. That the mayor and burgesses have no ight to compel the owners of waggons to bring them to be weighed. That the ouse, independent of the machine, is worth 5/, per annum; and the profits of he machine about 40/, per annum. That the house stands rated thus: "The nayor and burgesses of Gloucester for the machine bouse 241,-11. 16s."-The essions held that the profits of the machine were not rateable, and amended the ate to 51 only.

Bearcroft shewed cause against the rule for quashing the order of sessions. The question is, Whether the weighing-engine in the machine-house is an obect of the poor-rates, or whether the house alone ought to be rated? It appears rom the case that the thing rated is the machine-house, the value of which is tated to be only 5/. Now unless the Court can say, on these facts as stated in he case, that the weighing-engine is part of the house, the order of sessions nust be confirmed. But that is a question of fact, and as the justices at sessions save not found it, this Court cannot presume it. It does not follow that it forms part of the house, because it is stated to be in the house. And though possiby the machine may be presumed to be a part of the freebold by being let into the ground, yet it does not follow that it is a part of the house. Now if the engine be not a part of the house, the Court cannot determine on this case that it s rateable as personalty; for the rate is on the bouse. If every thing within the souse is to be rated under the name of the house, all machines belonging to nandfactures would be equally the subject of taxation; but that would be to impose a tax on manufactures.

Lee (Solicitor General) contra. It is stated in the case that the steel-yard 128 always been in the house, upon which the whole machine depends; the mathine therefore must be taken to be a part of the freehold. The circumstance of the payments having been voluntary cannot vary the question in this case; for here is no uncertainty in the payments; the machine produces certain annual profits, which the case states to be 40%. If the house without the machine be worth only 51, and from its situation, use, or any other circumstance, it becomes worth 40% it is liable for so much: the very thing which renders the house more valuable, is the machine. And in this case, it is perfectly immaterial whether this is real or personal property; for, by the private acts made for the provision of the poor in this city, personal as well as real property is liable to the poor-rates.

Lord MANSFIELD.—Though the case does not sufficiently explain whether his machine or steel-yard is annexed to the freehold, yet the nature of the thing supplies the place of an explanation. It must, from the very nature of it, be annexed to the freehold. It is stated to be the machine-house, and the steel-yard is the most valuable part of the house. The house was built for the machine, and not the machine for the house. No objection arises from the amount of the rate; for, though no deduction is stated to be made for the labour of working the machine, or for the wear and tear of it, yet it is only rated at a little more than half the value.

1787. ogainet Hoge.

house. And though that circumstance was insisted on at in bar, yet the whole was held rateable. If the argument et a The King convenienti were to be resorted to on such an occasion, it is be observed that these manufactures tend to encrease the man ber of the poor in those places where they are carried on; me those persons who are the means of encreasing the poor-rat ought to contribute to the support of the poor. The fact is troduced into the case, with respect to the usage of not rating personal property in this parish, cannot vary the present que tion; for till the case of the weighing-engine, no such pro perty as that had been rated; and yet that was no objection in that case. In The King against Saltrem (a) the Court said that the usage of a particular parish could not control the construction of an act of parliament. And in The King v. He man (b), Probyn, J. said, usages that can vary the construction tion of an act of parliament must be universal, and not on the usage of a particular parish.

Secondly. The engine, as producing a certain annual per manent profit without any risk, is rateable. It cannot now be contended that, as a general question, personal property is no rateable. In the case of the London waterworks (c) it was argued that the projects of a hazardous adventure were not objects of taxation: now the circumstance of having recours to such arguments admits generally that personal property rateable. In Rolls v. Gell (d), the lessee of lead mines unde the crown was held rateable for the certain annual profit which he received. So in the case of the weighing-engin there was a certain extraordinary profit arising from it which was determined to be rateable. If it be objected that the is a tax on labour and manufactures, the answer to it is, the

WILLES, J. concurred; adding that the whole was evidently considered one entire thing, for it was called the Macbine-House.

(†) BULLER, J. I cannot think that the justices at sessions had any doc but that the engine was a part of the house, and the most material part, b cause the profits arose from thence. The doubt left to the Court was, when profits are rateable. But the rate must be in proportion to the profits. If a principle is a second of the profits of the profits. va:e house be rated at any particular sum, and it be converted into a shop t rate must increase in proportion to the increased value of the house; but if the shop be again converted into a private house, the rate must proportionably crease. This case is similar to the Cheltenham Spa; while the waters are si the rate must be in proportion to the profits arising from the sale. In the sent case, the description is sufficient. The house is known by the name and rated as, the Machine-House: It is one entire thing.

Rule absolute for quashing the order of sessions

<sup>(†)</sup> Ashburst, Justice, was sitting in the Court of Chancery, as one of the Let Commissioners of the Great Seal.

<sup>(</sup>d) Compt 45 (a) E. 24 G. 3. B. R. (b) Bott. 8. (c) Cald, 155. n.

the tenant is not to pay the tax; and whatever doubt there might be, whether the person who carries on the manufacture would be subject to the rate in respect of the risk he runs. The Kino yet as soon as the engine is let, that risk ceases; it then produces a certain annual profit, and the manufacturer is not lia. ble.

against Hogo.

Bearcroft, Cockell Serjeant, and Topping, contra. The case of St. Nicholas Gloucester does not apply here. There the Court expressly said they were satisfied on the circumstances of that case that the engine was part of the freehold, and that the building was only made to cover it. It was fixed in the street, which was the soil of the corporation, and therefore it came within the words of the statute. It has been frequently remarked by the Court that they ought, in deciding questions upon the 43 Eliz. c. 2. to be governed by the words, and not to extend them by construction. Now there are no words in that act, which can justify the present rate, unless the engine be considered as part of the tenement. In the first place it is a rate on a house called the engine-house; but if it be not a house, it is immaterial what the name is; and this is expressly stated not to be a dwelling-house. In the next place the house was not built for the purpose of the engine; it was formerly used as a weaver's shop, and at present it contains two other engines besides the one in question, all of which, the case expressly states, are not fixed. It is said that, because it is sometimes worked by water, it must be fixed; but that is negatived by the case, for it is stated that it may be moved at pleasure. This cannot be said to be one entire subject; for if the house were freehold, the building would go to the heir, and the engine to the executor. Notwithstanding the original lessee is to pay the taxes, to rate this engine would be to impose a tax on the manufactures of the country; because the undertenant must pay a higher rent in proportion to the quantum of the taxes, so that the rate must ultimately fall on the manufacturer. They admitted that the usage of a particular place could not control an act of parliament, but contended that general usage might explain it. Now if this engine be rateable, the same reason will extend the rate to stocking or woollen machines, which were in use at the time of the act, but which have never been held to be the subject of a rate. It appears in all the cases where personal property has been held liable to be rated that there has been a constant usage in that particular place in support of it: Vol. I. Aaaaa

against Hoco.

but here such an usage is expressly negatived. As the argument of inconvenience has been resorted to, that these manu-The King factures encrease the number of the poor, it must be observed that the fact is the reverse; for they are the means of affording employment to many of the poor, who would otherwise have been under the necessity of receiving relief from the parish.

ASHHURST, J. It seems to me that this case is still left imperfect, for it is not stated negatively that this engine is not in some way or other fixed to the house while it is in a a state of working. It is only stated that it is not fixed to the floor: but it may be fixed to the walls of the building without being fixed to the floor. And considering the nature of the thing, it must be so; for it is stated that the engine is worked by water, and the force of the water would displace it if it were not fastened to the building. We cannot take any facts that do not appear on the case, as it is now returned; and it is not stated negatively that the engine is not fixed to the house. At all events part of the subject is rateable; and the rate is on the house itself; and if the thing itself be rateable, the quantum of it is not for our consideration, but for that of the justices below. There are many other circumstances stated here which would induce us to discharge this rule. case comes directly within the case of St. Nicholas Gloucester. The house and engine are leased as an entire subject; for it is stated that the premises (which comprehends the engine and the house together) were let to Walmsley, who underlet to Hogg: and that takes away all leaning we might otherwise have to discourage a tax which might possibly be a tax on labour; for this is not such a tax, but on the contrary it is expressly stated to be a rate on the lessor of the premises. the whole therefore I am of opinion, that there is no good reason to induce the Court to make this rule absolute.

BULLER, J. I have always been of opinion that it would have been better to have given a direct opinion at once upon the construction of the 43 Eliz. c. 2. than to state particular cases, in order to see whether they formed exceptions to the act without giving an opinion on the general construction of it. In the case of Atkins v. Davis (a), I stated the principle to be that every man should pay acording to his ability; it seems to be a principle of natural justice; and if that be right, the court has nothing to do in doubtful cases, but to

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against Ĥogg.

see how they can be adapted to the principle. In that case I agreed with the court that we cannot impose a new tax on the subject by construction: we are not to make, but to explain The King But I then thought and still do think that, as a general question, personal property is rateable, and the question ought always to be, whether the particular case be an exception to the general rule? I am very well aware of the great difficulty of rating personal property in all cases: but if it can be done, we must pronounce the law; and I think by law it is rateable.

Now in this case it is objected that the property is distinct in its nature; that the building and the engine are not the same, because the former would go to the heir and the latter to the executor. This may be so in some cases, but I think the objection is perfectly immaterial here. If the house be freehold it will go to the heir, if leasehold to the executor; and if the engine be distinct from the house, that at any rate would go to the executor. But if the property be in its nature rateable, it is indifferent to whom it will belong. ever, in this case it is clear that both the engine and the house go together, for they are in the hands of a leaseholder; they are rented together, and therefore would go to the exe-But in my opinion that does not make any difference in the question. The counsel for the appellants then objected that this is a rate on manufactures; I agree that it is so. Yet it is not a rate on labour, which cannot be maintained; but on the produce of labour, and the produce of labour is ratea-What a person may acquire in a profession is not eo nomine rateable: but if, with his profits he purchased land, &c. that may be rated. Therefore, in questions of this kind, we are not to go into the manner in which the property may have been acquired; but the question ought always to be, Whether the thing which exists is to be rated? And the rule is that personal property, if visible and yielding a certain annual permanent profit, may be rated. In the present case the house and the engine are let together as an entirety; and upon this ground also I am of opinion that the rate is good.

GROSE, J. The question for the opinion of this Court is not, whether the rate itself be equal or not? that is a matter for the consideration of the justices below: but the question here is, whether by law this particular species of property as described in the case is or is not rateable? Now the property

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The King against Hogg.

question is an engine-house fitted up with this engine in it (whether fixed to it or not is not stated,) and all let together under one lease. For it appears that Walmsley was the lessee of the premises, which comprehends the engine as well as the house. Then the engine is let as part of the house; and the rate is upon the engine-house. Now by the express words of the statute 43 Eliz. c. 2. s. 1. every occupier of lands, houses, &c. is liable to be rated. Leasehold property has always been rated, and this comes within that description. Suppose the owner of a tenement, which unfurnished would let only for a trifling rent, fitted it up as a malt-house, and put a malt-mill into it, and then let the whole together; the whole must be estimated together as any other leasehold property according to its value. It has been argued that this rate cannot be supported, because it has not been the usage in Ribchester to rate personal property. But we are interpreting an universal law, which cannot receive different constructions in different towns. It is the general law of the land that this kind of property should be rated; and we cannot explain the law differently by the usage of this or that particular place. had been any agreement entered into by all the inhabitants of the town not to rate any particular species of property for their own accommodation, that might have been binding upon themselves as an agreement: but if a case be stated for the opinion of this Court upon the law on the subject, we cannot construe the act of parliament according to their agreement. As to usage, I am clearly of opinion that it ought not to be attended to in construing an act of parliament, which cannot admit of different interpretations: where the words of the act are doubtful, usage may be called in to explain them. it is not pretended but that the house is worth the sum at which it is rated; and if so, we cannot say that property in such circumstances shall not be taxed. As to the argument of this being property of different kinds, and that part of it would go to the heir, and part to the executor, it does not prove that the house ought not to be taxed at the sum at which it is let, but it attempts to shew that it should be taxed only at the sum for which it would be let, if there were no fixtures; but here the house and the engine are let together as an entire subject, and as such they are liable to be rated. This case is not to be distinguished from that of St. Nicholas in Gloucester.

Rule to quash the order of sessions discharged (a).

<sup>(</sup>a) Vide H. Bl. Rep. 258. n. a.

### HUTCHINSON against JOHNSTON.

1787. May 12th.

HIS was a rule to shew cause why the sum of 701. 13s. Where two 10d. paid by the plaintiff to the sheriff of Middlesex un-writs of fieri ler a writ of *fieri facias* issued at the suit of *f. Gever* against facias against the goods, &c. of the defendant should not be repaid by the same desheriff to the plaintiff.

The circumstances which gave rise to this application were delivered to these: On the 25th of November 1786 the plaintiff entered up different judgment against the defendant for 600/, and on the same day days, and no sued out a fiers facias directed to the sheriff of Middlegen; on sale is actuwhich a warrant was granted on the same day to Simpson a the defendsheriff's officer, who entered and took the defendant's goods ant's goods on the evening of that day. On the 27th of November another the first exsheriff's officer entered the defendant's house by virtue of a ecution must warrant on a fieri facias dated 23d of November for 63l. 10s. ority even and interest, besides fees, &c. at the suit of Gover. On the though the return of the writ, the plaintiff applied to the sheriff for a bill seizure were of sale, who informed him that Gover's execution, being first made brought into the office prior to the plaintiff's must be first sa-subsequent tisfied; upon which the plaintiff paid into the sheriff's hands execution. 701. 13s. 10d. the amount of Gover's execution, which was And if the the sum now claimed.

Bearcroft, Mingay, Palmer and Garrow, shewed cause, and under the contended that the sheriff was not only justified, but bound second exeto give a preference to Gover's execution, because the writ the sherik which was first delivered to the sheriff must be first executed, the amount At common law the goods were bound from the teste of the of the debt fieri facias; but by the 29 Car. 2. c. 3. s. 16. they are bound under the from the delivery of the writ to the sheriff. The moment tion tor his therefore Gover's execution was delivered to the sheriff, the security defendant's goods were liable to satisfy his debt. In Smul-the Court comb v. Buckingham (a), Ld. Holt said, that if two writs be compel the delivered to the sheriff on different days, and the sheriff ex-sheriff to reecute the last first by making sale of the goods, the sale will fund that stand good, and the person who delivered the first writ to the money on sheriff shall have his remedy by an action against him. But the motion, reason given why the vendee in such a case should keep possession, is, because it is for the quiet of purchasers. So that, if the sheriff had actually made sale of the defendant's goods under the second execution, the vendee might have retained

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(a) Gerth. 420,

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them against the creditor under the first execution: but as no sale was made under the plaintiff's writ of execution, the HUTCHIN-: goods were bound in the hands of the sheriff by the delivery of Gover's writ. The seizure by the sheriff's officer was a JOHNSTON, seizure by the sheriff; and no act has been done in this case to give an absolute priority to the plaintiff's execution: but if a preference has actually been given to either, it is to Gover. because this application appears to be made to recover back money paid under Gover's writ. As no sale was made under the plaintiff's execution, the writ first delivered to the sheriff is entitled to a priority. So though an extent at the suit of the crown takes place of an execution sued out before: vet if the goods have been actually sold under a prior execution, an extent will not over-reach the sale. And this is the reason of making provisional assignments under commissions of bankrupt, lest an extent should issue before a final assigna-

Burrough, contra, admitted that the sheriff has in law mo election, but is bound to execute that writ first which is first brought to his office. But though he is so bound, yet if in point of fact he does elect, such election binds the goods, and the other party has only a remedy against the sheriff. An execution is an entire thing, and cannot be superseded after it is once begun. Glerk v. Withers, Salk. 322. Charter v. Peeter. Cro. El. 597. Moor 542. Here the sheriff had begun to execute the plaintiff's writ first, which when once begun could not be defeated by Gover's execution. The statute of frands makes no difference in the present case: at common law the goods were bound from the teste of the writ; and this statute directs that they shall only be bound from the delivery of the writ to the sheriff. But it was determined soon after the passing of that act, "that it was only made to assist a purchaser in market overt, and that it left the party to the suit as he was at common law (a)." In 2 Eq. Cas. Abr. 381. Ld. Hardwicke recognized the same construction. 1 Ld. Raym. 252. In Salk. 323. it is said, that by a seizure of goods under an execution the property is absolutely divested out of the defendant, and is in abeyance. From the moment of the seizure under the plaintiff's execution, the plaintiff had a right to the produce of the goods, though he had no property in the goods themselves. And though the act of the officer be the act of the sheriff so as to make the sheriff answerable, yet the entry of one officer for a particular purpose under a special warrant cannot be the entry of the sheriff for another purpose.

that the entry of Simpson under the plaintiff's execution not be considered as the actual execution of Gover's writ. d independent of the right, it would be highly inconvenient HUTCHINllow a dormant execution to take place of a subsequent one against ually executed: it would open a door to infinite fraud and JOHNSTON. ustice. And the safest rule seems to be, that he who first zes should be first entitled.

Douglas, amicus Curia, mentioned the case of Rubot v. Peckm (a), where it was determined that the execution last exsted. though first delivered, was good against the sheriff. ASHHURST, J. The general principle of law, and which not been contradicted by any of the cases cited, is, that person whose writ is first delivered to the sheriff is entitled a priority; and that the goods of the party are bound by the livery of the writ. But the legislature saw the inconvenie and hardship which would fall upon innocent purchasers, he vendee under the second writ were liable to be dispossed of the goods which he had bona fide bought; and theree they guarded against it by the statute of frauds. derstand was the sole object of that part of the act. It was ly intended to secure the possession of purchasers under an ecution. Here Gover's execution was delivered on the 23d November, and the plaintiff's not till the 25th. It is true leed that the entry under the first execution was not made the 27th, which was after the second; but though the eriff suffered the seizure to be made under the second writ st, yet he knew at that time of Gover's execution, and therere made the bill of sale to the plaintiff expressly under the ndition of securing him against Gover. This then is not bill of sale under an execution to an innocent purcha ser, it to a person who purchased with notice of a prior claim.

(a) M. 19 G. 3. B. R. the Court seemed to think at the time, whan afterirds appeared to be the fact, that in the case of Rybor and Peckbam, which s been cited, there had been an actual sale. That case was as follows : Rybot v Peckbam, Michaelmas 19 Geo. 3. This was an action against the shefor a false return to a fieri facias. The plaintiff delivered a writ of execun to the sheriff, under which his officer levied the debt, and made a bili of sale. ien the sheriff discovered a former execution in the office, and returns:d nulls 24. On this case the defendant obtained a verdict. But a motion was made for a new trial on the ground, that though the other it of execution being delivered first was material between the plaintiff in that it and the sheriff, and would be sufficient to charge the sheriff, with that bt; yet it was not material between the present plaintiff and the sh eriff, for , having once sold under the plaintiff's execution, was answerable to him for e debt. Carth. 419. Salk. 320. & 5 Mod. 376. were cited, On the day of ewing cause, the defendant's counsel gave up the case; and a verdict was orred to be entered for the plaintiff.

HUTCHIN-SON against IOHNSTON.

This agreement takes it out of all the cases cited with respe to innocent vendees. The cases cited shew clearly the though the possession of an innocent vendee shall not be as turbed, yet as to all the rest of the world the goods are box from the delivery of the writ. In Rybot and Peckham there cond execution was completed; and it was for that reasonth the claimant under the first execution could not recover be money out of the hands of the creditor under the second en ecution; and his only remedy was by an action against the But that is not like the present case; for here the execution was not so completely executed as that the most was paid into the hands of the plaintiff claiming under the x cond execution. He is not a vendee without notice, and so not protected by the statute. It is clear therefore, that he not entitled to recover this money out of the hands of the sheriff.

BULLER, J. At all events this rule must be discharged for supposing the law to be as the plaintiff's counsel has contended, this is not a case in which the court ought to interfer on motion: for if the plaintiff be right he may bring his action against the sheriff. But I think the law is clearly other wise. In the case of Rybot and Peckham, the sheriff, having two writs of execution, levied and sold under the second There the court held him answerable to both parties. But here Gover's writ was first delivered to the sheriff, and he has actually sold under that execution, as appears by the plaintiff own rule. Therefore the sheriff having levied at the suit of Gover is liable to him.

GROSE, J. Declared himself of the same opinion; ebserving that the money which was the object of the present spplication was levied under Gover's execution.

Rule discharged

Monday, May 14th.

### SHOVE against WEBB.

The consideration of an annuity being partly a debt antecedently due for goods sold

A SSUMPSIT for goods sold and delivered; money paid laid out, and expended; money had and received; and for goods sold and delivered to one A. Dobinson upon the defendant's credit and at his request. Plea the general issue.

goods sold and the residue thereof money paid at the time of granting it, the grantee may recomback the whole consideration, if the annuity be set aside for informality in registering the morial. Quare, Whether he can, if part of the consideration be for goods sold at the times granting the annuity?

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On the trial at the sittings after last Hilary Term at Guild-hall before Buller, J. a verdict was taken for the plaintiff, damages 160l. 17s. 3d. subject to the opinion of the Court as to the sum of 118l. 17s. 3d. part thereof.

SHOVE against WEBS.

The defendant on the 26th of July, 1783, executed a bond and warrant of attorney to confess judgment thereon in the court of Common Pleas, for securing an annuity of 25l. during the life of the defendant. The defendant also executed an assignment of his half-pay as an ensign in the army as a collateral security. The deeds for securing the annuity have been since set aside in the Common Pleas, because part of the consideration, for which the annuity was granted, was 46l. 19s. 9d., due from the defendant to the plaintiff for goods previously sold by the plaintiff to him, which was not specified in the memorial as registered. The residue of the consideration, for which the annuity was granted, was 71l. 17s. 6d. paid by the plaintiff to the defendant in cash at the time of granting the annuity. The defendant is indebted to the plaintiff in 42l. for goods sold.

The question for the opinion of the Court is, Whether the plaintiff is entitled to recover any, and what, sum beyond the

sum of 42/.?

This case was argued on a former day in this term by Wood for the plaintiff, and Bower for the defendant, when the Court took time to consider of it.

On this day Ashhurst, J. delivered the opinion of the Court. The question in this case will depend on the construction of the statute 17 Geo. 3. c. 26. called the Annuity Act. It appears from the above state of the case, that the contract between the parties was for the sale of an annuity of 251. per ann. by the plaintiff to the defendant, the consideration of which was a debt of 461. 19s. 9d. antecedently contracted by the defendant, and a sum of 711. 17s. 6d. paid to him by the plaintiff in money. Upon the registering of this contract under the Annuity Act, the consideration was stated to be the sum of 1181. 17s. 3d. paid in money, whereas part of it was for goods sold. The Court of Common Pleas very properly set aside and vacated the security, which they found themselves bound to do under the express words of the statute. And the question is, Whether, as the security is set aside, the party can resort back to the original debt, the fairness of which is not impeached, and maintain his action for the recovery of it? On the part of the defendant it was argued that the Legislature meant to make it illegal to contract for the sale of Bbbbb Vol. I.

SHOVE against WERR

of an annuity for any other consideration than that of money, and if any part of the consideration is for goods delivered, it so far taints the transaction, that if the security is set aside, no right of action can ever arise as for goods sold. In order to decide this question, it will be necessary to consider the provisions and meaning of the act of parliament. It first provides that a memorandum of all deeds for granting life annuities shall within 20 days after the execution thereof be enrolled in the Court of Chancery, which shall contain the date, names of the parties, &c. otherwise the security shall be void. It then provides that in every deed, instrument, or other assurance, by which any annuity shall be secured, "the consider-" ation really and bona fide paid, which shall be in money only, " shall be fully and truly set forth and described in words at " length, otherwise to be null and void to all intents and pur-"poses." Then it provides, that "if any part of the consideration shall be returned to the person advancing it, or if the consideration be paid in notes which shall not be paid when due, or if the consideration or any part of it be paid in goods, &c. in all and every of the aforesaid cases it shall and may be lawful for the party to apply by motion, &c. and if it shall appear to the Court that such practices as aforesaid or any of them have been used, it shall and may be lawful for the Court to order the deed, bond, &c. to be cancelled, and the judgment, if any has been entered, to be vacated." These are the principal provisions in the act of parliament on which the question drises. Now had any part of the consideration been for goods delivered at the time, which by agreement were to stand for so much money as the value put upon them, then the question would have fairly arisen, Whether, as this was in the teeth of the act of parliament, and one of the mischiefs the act meant to remedy, as great frauds were practised in palming goods upon the purchaser of the annuity, which were not of half the estimated value; then I say the question would fairly have arisen, whether, if the securities were set aside, the law would have raised any implied promise to pay the value of the goods? and the maxim might have been urged quod ex maleficio non oritur contractus. But as that is not the case here, we give no opinion upon it. The goods here were not origiginally delivered with any view to such contract, but were really and bonu fide sold. The contract was strictly legal, and not within the mischiefs intended to be remedied by the act.

The security then is set aside, not on account of any fraud or defect in the contract itself, but upon a formal defect in

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making the memorial, or at least it was an innocent mistake of the law. And taking that to be the case, when the security was vacated, the original contract revived. If indeed the sale had been made a few days before colourably, and with a view of afterwards stating the antecdent debt as a part of the consideration of an annuity intended to be granted, that would have totally altered the case; but as it is to be taken that they were bona fide sold, we think the plaintiff is entitled to recover for them.

1787. SHOVE againet Ŵas.

In regard to the money paid as part of the consideration; as the security is not set aside for any fraud in the transaction, but merely for a mistake or an omission in form, it becomes unconscientious in the party to retain it, and is therefore recoverable on the count for money had and received to the plain. tiff's use. Therefore we are of opinion that the plaintiff is entitled to recover for his whole demand.

Judgment for the plaintiff 160l. 17s. 3d.

# GOODTITLE on the Demise of ESTWICK against WAY. Monday,

TPON a motion for a new trial, where Bearcrost, Bower, A paper and Mills argued for the defendant, and Plumer for the containing lessor of the plaintiff, the Court took time to consider, and now werds of ASHHURST, J. delivered the opinion of the Court as follows: tract, with This was an ejectment brought by the lessor of the plaintiff, an agreeclaiming under a demise made by Lord Abingdon to him, by ment that deed dated in 1784, where the trust of the term was for the should take benefit of creditors. The defendant claimed under a lease, as possession it was opened by the defendant's counsel (at the last Oxford immediately, assizes before Grove, J.), dated in 1779, which was prior in and that a point of time to the demise to the lessor of the plaintiff. The be energial agreement when produced in evidence, appeared to be on pa- in futuro, per unstamped, and not under seal; it imported to be articles operates one of agreement between Lord Abingdon and the defendant's fa- ly as an ather, by which Lord Abingdon, in consideration of a sum of for a lease, money to be paid by Way, sold him the goods in his house at and not as a Rycot. The subsequent part of the agreement was as follows; lease itself;

" And and there-

stamped, if executed before 23 G. S. c. 58. The trustee of a term to satisfy erecitors, not having notice of an agreement for a lease before the grant of the term, may maintain an eject-ment against the tenant in possession under the agreement. A lease in writing, though not under seal, cannot be given in evidence, unless it be stamped.

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" And further the said Earl of Abingden doth hereby agree to " let, and the said Richard Way agrees to rent and take, for Good return the term of seven, fourteen, or twenty-one years, in case the " said Earl shall so long live, at and for the rent of 1400/. a-"year, to be paid half-yearly, (the said Earl to pay or allow " all manner of tithes and taxes both ordinary and extraordina-"ry.) all his estate, &c. at Rycot. It is agreed, the said Ri-" chard Way shall enter upon all the said premises immediately, "but not commence payment of rent until Lady-day next. " is further agreed, that leases with the usual covenants shall " be made and executed by the parties on or before Michael. " mas next."

> On the production of this, it was contended that this being produced as a lease, and not being stamped, it could not be read in evidence; and the judge being of that opinion, the cause was not further gone into, and the plaintiff had a verdict. motion has been made for a new trial, on the ground that this was not in fact a lease, though it was so opened by the defendant's counsel, but only an agreement. On the part of the plaintiff, it was contended that this is a lease, being by words, de præsenti; for which was cited Prosser v. Phillips at Niei Prius, before Mr. Baron Perot (a); or taking it not to be a lease. but only an agreement for a lease, then it gave the defendant only an equitable title, which cannot be set up in a court of law against the plaintiff who has a legal title. So that either way the verdict was right. On the part of the defendant it was contended, that though in common parlance, this may be termed a lease, it is in law only evidence of a parol demise. it not being under seal, and that, being only matter of evidence, it need not be stamped. And as to the other objection, they answer that the defendant's agreement is prior to the demise to the plaintiff, and that they could have proved that the plaintiff, at the time of the defendant's title, knew of the demise to him; and that the conveyance to him being a voluntary conveyance, he stands in the place of Lord Abingdon, and must be considered as a trustee for the defendant; and the Court will not permit him to bring an ejectment against his cestui que As to the question whether this is or is not a lease, we are all of opinion that this is not a lease (b). The case in New 128. of Sturgeen and Paynter is in point. In the present case, there is also an express stipulation that leases should be drawn before

> > (a) Bull. N. P. 269.

(b) Vide Gro. II. 33, 486.

against

before Michaelmas; therefore it plainly was not the intention of the parties that such agreement should operate as a lease; but only that it should give the defendant a right to the imme. GOODTITLE diate possession till a tease could be drawn. Had it been a lease, and as such it was offered in evidence, we think that the determination was right, that it ought to be stamped. For as to the argument that the word lease is inserted in the stamp. act amongst other instruments which are all specialties, and therefore that it shall not be intended that the Legislature meant to include leases not by deed, we do not think any such intention can be inferred. The only object of the Legislature was to raise a revenue from certain things enumerated. There is no reason why one of the things should be charged rather than another. It is a matter of mere positive institution; and as it falls within the words, there is nothing in the nature of the thing to take it out of them. But if we thought that this had been a surprize upon the defendant, and that by granting a new trial we could enable the defendant to make use of this paper as an equitable agreement, and to set it up as a valid obicction to preclude the plaintiff from bringing his ejectment, we perhaps should not refuse it.

The ground on which the defendant rests his title is this a It is said that the lessor of the plaintiff only represents Lord Abingdon, it being a voluntary conveyance, and is to be considered as a trustee for the defendant, and as such he shall not bring an ejectment against his own cestui que trust. If we were to decide that, it would be going a great deal further than has ever yet been done. The only cases, where this principle has been adopted, are where the lessor of the plaintiff has been clearly and unequivocally a trustee for the defendant; and it would have been of course for the Court of Chancery to have decreed a conveyance to him. It is not necessary for us to say what a Court of Chancery might do in the present case. But thus much we may say, that it is not a mere voluntary conveyance to the lessor of the plaintiff. It is made to him as a trustee for the benefit of creditors, and it is the same as if a mortgage had been made to any individual creditor, and he had brought the ejectment. In that case, it might perhaps be contended, that as each party had an equitable claim upon Lord Abingdon, whoever first got the legal title to the estate ought not to be devested of it by a court of equity. But we do not mean to give any opinion as to this. It is enough for us to say, that this being at least a doubtful inquiry, which the defendant sets up against a legal title, this court, or a judge, at Wis Prius, would not, and ought not to interpose; and therefore against it would be nugatory to send it down to a new trial.

Rule discharged (a).

(a) Vide post. 2 vol. 739. Doe d. Coore v. Claire; & post. 5 vol. 163. Roe L. Jackson v. Asbburner.

Monday, May 14th. SMITH on the Demise of RICHARDS against CLYF. FORD.

E JECTMENT for lands lying in Normantown, Notting-ham, tried before Heath, J. at the last Nottingham assi-A. tenant for years. remainder to B. for life, zes; when a verdict was found for the plaintiff, subject to the remainder to opinion of the Court on the following case; the first and John Richards by his will, dated 30th June 1753, devised other sons of all his lands, &c. in Normanton or elsewhere, either in possession, reversion, or remainder, to Thomas Richards, Thomas remainder to the heirs Lee the elder, and Thomas Lee the younger, to the use of the of B. in tail; testator's nephew, John Richards, for life; remainder to the join in a first and other sons of John Richards in tail; remainder to lease and re-the heirs of the body of his said nephew John Richards; release to mainder to trustees in trust to sell the same and divide the momake a tenant to the ney arising therefrom among the testator's four sisters. and precipe, and his niece therein named. On 30th May 1754, the testator by suffer a reco- a codicil to his said will declared the said devise as far as revery; the estate-tail li- lated to his nephew to be null and void, and directed that he mited to the should only have so much of the said premises as should amsons of B. is ount to the yearly value of 201. with certain limitations over. not devested By indentures of lease and release, dated 4th and 5th April by the recovery, nor is 1764, between Thomas Lee, the surviving trustee in the will, of the first part, John Richards, the testator's nephew, of the there any forfeiture of second part, John Chyfford, the defendant, of the third part, the respecand Thomas Dalby and William Dixwell of the 4th part, recitive estates of A, and B, ting the will and codicil, and also an indenture dated 18th November 1760, between the said J. Richards, the testator's nephew, of the one part, and the defendant of the other part, by which Richards in consideration of 3004 granted to the defendant all the estate, &c. devised to him by the testator which should be allotted to him by his trustees, for ninetynine years, if Richards should so long live; and also reciting a decree in Chancery, whereby it was decreed that the will and codicil of Richards should be established, and the trusts thereof performed, and that Richards (party to the indenture) was entitled to have so much of the devised premises as should amount to the yearly value of 20%, and that Lee, the surviving trustee should set out a part of the premises of such vearly

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rearly value. Lee in obedience to that decree, by and with the approbation and appointment of the present defendant, and Richards, (party thereto) bargained, sold, released, allotted, confirmed and appointed, unto Dalby and Dixwell, and their CLYFFORD. neirs, all the premises in the release and appointment mentioned to the use of the present defendant, his executors, &c. for ninety-nine years, if Richards (party thereto) should so long live, remainder to Richards for life, remainder to the first and other sons of Richards successively in tail, remainder to the heirs of Richards (party thereto) in tail, remainder to the use of Lee and his heirs, upon the trusts in the said will and codicil appointed. By indentures of lease and release of three parts, of the 21st and 22d of June 1765, between the present defendant and Richards of the first part, F. Gregg of the second part, and John Kirkland of the third part, for docking and barring all estates tail, and all reversions, &c. of the premises in question, the defendant and Richards granted, &c. to Gregg, to make him tenant to the præcipe, that a recovery might be suffered of Trinity term then next, that Kirkland should be seised to the use of the defendant for the term of ainety-nine years, created by the deed of November 1760, determinable on the decease of Richards, remainder to Richards and the defendant, and the heirs of Richards for ever. Michaelmas term 1765, a recovery of the premises was suffered, in which Kirkland was demandant, Gregg was the defenlant, and the present defendant and Richards were vouchees. The defendant confessed lease, entry, and ouster, but no evilence was given of an actual entry upon the land made by the essor of the plaintiff before the ejectment brought. John Richards the nephew of the testator, and father of the lessor of the plaintiff, is now living. John Richards, the lessor of he plaintiff, is the eldest son and first tenant in tail under the will of the testator. At the time of suffering the recovery, the lessor of the plaintiff, was an infant under twenty-one, and s now of the age of thirty years. Thomas Lee the younger, was the surviving trustee named in the testator's will at the ime of the execution of the deed of 1764.

The question for the opinion of the Court is, Whether the essor of the plaintiff is entitled to recover?

Willis, for the lessor of the plaintiff, contended first, that the ecovery suffered by Clufford, the tenant for years, and Richurds, the tenant for life, was a forfeiture of their respective estates in the premises. And secondly, that the lessor of the

plaintiff

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plaintiff was entitled to recover, notwithstanding no actual co

try was proved.

In considering the first question, it may be necessary to atvert to the situation of the different parties after the will a 1753, and at the time of the recovery in 1765. Richards & nior being tenant for life under the will, together with Lee the surviving trustee, conveyed by the deed of 1765 to Dalby and Dixwell, to the use of the defendant for ninety-nine years, remainder to Richards senior for life, remainder to the lessor of the plaintiff in tail. By that deed the defendant became tense for years, the use being executed by the statute. And under the will and the deed of 1765, Richards, senior was only tenant for life, and the lessor of the plaintiff tenant in tail. The defendant, tenant for years, and Richards, tenant for life, the suffered a recovery to the use of the defendant for the term first created, (which was then extinguished,) remainder to the defendant, and Richards for life, remainder to Richards in fee. Now it is perfectly clear, that alienations by particular tenants, when they are greater than the law entitles them to make, and divest the remainder or reversion, are forfeitures to him whose right is attacked thereby (a). If tenant for life suffer a common recovery, or any other recovery, by covin and consent between the tenant for life and the recoveror, this is a forfeiture of his estate, and he in the reversion may presently enter (b). The same law, which is laid down with regard to tenants for life, holds also with respect to tenants of the mere freehold, or of chattel interests (c). There can be no doubt therefore, but that Richards the tenant for life forfeited his estate by being vouched in the recovery. The defendant, who was tenant for years also forfeited his estate in three several ways; first, by surrendering his term as an independent estate to the use of a term which was extinguished; whereby he took back no estate at all for years, but a larger estate for life as joint teams. Secondly, by joining with the tenant for life in the recovery to give him an estate in fee, whereby the remainders were de-Thirdly, by joining with the tenant for life to make: tenant to the pracipe, there was an union of the two estates, by which the tenancy for years was completely merged. As to the first, the term was extinguished by the deed of 1765. Under the deed to lead the uses of the recovery, the estate is

<sup>(</sup>a) Co. Lit 251 a. 2 Bl. Com. 274. (c) 2 Bl. Com. 275. 1 Atk. 571.

<sup>(</sup>b) Co. Lit. 355: c. I Co. 15.4

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declared to be to the use of a term, which was at that time extinguished. And although the recovery may not be good in point of law, yet the defendant is estopped from saying so, and from saying that the term was not surrendered. A re- GLYPPORD covery may be attempted to be suffered, and be an estoppel against the person suffering it, though it shall not have effect as a recovery. As if tenant in fee-simple be disseised, and after disseisin suffer a recovery, this is good by way of estopped against the disseisee and his heirs; for they shall not be admitted against their own act to impeach the recovery, not can the recoveror have any thing, because the tenant to the pracipe was out of possession, and consequently had nothing to lose. Cro. Car. 388. Besides, here the tenant for years took back a joint estate for life, which was larger than his former estate, which is in itself an absolute forfeiture. With respect to the second cause of forfeiture: it is immaterial whether Clufford, the tenant for years, was or was not a necessary party to the recovery, because he has averred himself to be so on the record by being vouched; by that he made himself particeps criminis. And a tenant for years may forfeit his estate by doing any act to enlarge any estate to the prejudice of those in remainder, even though he does not enlarge his own estate. Dyer 339. Co. Lit. 251. b. 1 Ro. Abr. 855. pl. 8. 1 Leon. 262. 1 And. 45, 6. As to the third, the estate for years merged in the estate for life, when they united in the tenant to the præcipe, because there was an union of two estates in the same person for the same purpose. If the case of Fountain v. Coke (a) be cited on the other side, it is sufficient in answer to it to say, that the lessee for vears by being made tenant to the pracipe for suffering a common recovery, did not extinguish his term, because it was in him for another ourpose. So that it does not apply to the present case. That case turned on the saving clause in the statute of uses (b). But in this case, the two terms were in the tenant to the præcipe for the special purpose of suffering a recovery. Chenie's case, cited in 7 (o. 20. a. and Ferrers v. Fermor, Cro. Jac. 643. both went on the distinction made in the statute 27 H. 8. c. 10. s. 3.

Secondly, actual entry was not necessary in this case. Dougl. 468. Bull. N. P. 103.

The court then stopped the counsel on this point, it being clearly established that actual entry was not necessary. Ccccc Vol. I. Sutton

(a) 1 Mod. 107.

(b) 27 H. 8. c. 10. s. 3.

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Sutton for the defendant, after observing that if the mortgagee had forfeited his estate, it was solely owing to a blunder, made two points; first, that the recovery was no forfeiture of any estate; and, secondly, that if the freehold estate of Richards were forfeited, the mortgage term, which was created prior to the recovery, was not extinguished.

As to the first, the parties to this recovery had such an interest in the premises as enabled them for some purposes to suffer a recovery. Under the will and codicil in 1753 and 1754, J. Richards the elder took an estate for life in possession, with a remainder in tail, vested not indeed in possession but in interest. It is true, that according to Lewis Bowle's case (a), and the case of Colson v. Colson (b), those two estates could not unite on account of the intermediate remainder to the devisee's first and other sons in tail. But in that situation. Richards the elder was enabled by his estate for life to make a tenant to the præcipe, and by reason of his estate tail. to come in under the voucher in order to bar that remainder. Now this recovery does not affect the intermediate remainder to his first and other sons; and therefore is not within the statute 14 El. c. 8. In Wiseman v. Grow (c), it was held that the statutes 32 H. 8. and 14 Eliz. c. 8. only extended to restrain recoveries against tenant for life only, and which at common law would bar him in remainder. And in Com. Dig. title Forfeiture A. 3. it is said that an alienation by a particular tenant is no forfeiture, if the reversion or remainder is not thereby divested. This recovery, being with a single voucher, may have a legal operation so as to bar the estate-tail to Richards in remainder, without divesting the remainder to his first and other sons, which was precedent to this estatetail. Maredith and Others v. Leslie and Others, 6 Bro. Parl, Ca. 209. Co. Lit. 204. b. n. 1. Pigg. Recov. 109. And in Co. Lit. 214. a. it is said, that if two persons grant, it shall be presumed that each grants that which he lawfully may grant. If then Richards was vouched in the recovery, in respect of his estate-tail, the lessor of the plaintiff cannot recover during the life of the tenant for life; and it is expressly stated in the case, that the tenant for life is still living.

But, secondly, if the freehold estate was forfeited by the recovery, the mortgage term was not affected by it. It is extremely clear, that if the mortgagee had not joined in the recovery.

(a) 11 Co. 79. (b) 2 Att. 250. (c) Cro. Eliz. 562. 10 Co. 46. a.

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covery, his interest could not have been affected by it. Then the question is, Whether he has done any act to forfeit it? Now he only conveyed his term to the same person to whom the mortgagor conveyed his interest; and the tenant to the Chyprogu. præcipe was merely a trustee for the mortgagor. If the tenant in tail, Richards the elder, did not do any act to incur a forfeiture, neither did the tenant for years, because he did not displace the remainders. And the only reason why the mortgagee took a joint estate for life was for the purpose of barring dower. He had no intention of taking a greater estate than he had before. Neither can it be said that the term merged when united with the freehold in the tenant to the præcipe, because he had the term in one right, and the freehold in another. Co. Lit. 338. b. And besides, by the uses of the recovery it was expressly declared, that the old use should continue. However, if the term merged, it revived again after the recovery was suffered. For this the case of Ferrers v. Fermor (a) is directly in point.

Willis, in reply. By the recovery the tenant for years not only took back his former term, but he also took a joint estate for life. That must have its legal operation; for the intention of the parties, that it was only for the purpose of barring dower, does not appear here. This is not like the case of Ferrers v. Fermor, where the lessee took only for the purpose of the recovery, and retained only his original term. In this case the intermediate estate tail was destroyed by the recovery; and this is like the case in Dyer, 339.

Cur. adv. vult.

And afterwards Ashhurst, I. delivered the opinion of the Court.

The only question that has been made is, Whether the recovery that has been suffered by Clyfford, the tenant for years, and Richards, the tenant for life, or the acts which were done preparatory to it, will amount to a forfeiture of their respective estates? Now, as to Clyfford, the tenant for years, it will be totally nugatory to consider whether he has done any act to forfeit his estate, unless the tenant for life has likewise forfeited his; for if he has not, he is the only person who can take advantage of the forfeiture of the estate for years; so that I shall lay the question relative to the tenant for years entirely out of the case.

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(a) Gro. Fac. 643.

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In regard to Richards the tenant for life, it is insisted that, by suffering a recovery, he has forfeited his estate for life; for which was cited Co. Lit. 356. a. The passage is, " Here note, that albeit the action be false and feigned, yet is the CLAFFIED " recovery so much respected in law, as it worketh a discon-"tinuance. But if tenant for life suffer a common recovery, " or any other recovery, by covin and consent between the tenant for life and the recoveror, this is a forfeiture of his " estate, and he in the reversion may presently enter for the " forseiture," Lord Coke then observes, that " since Littleton "wrote, the statute of 14 Eliz. c. 8. was made, concerning "this matter, which hath been well construed and expound-" ed, and needs not to be repeated." But we all of us think that this passage can only be understood of a bare tenant for life, who takes upon himself to do an act inconsistent with the nature of his estate; and which before the statute of Elizabeth, would have displaced the remainders subsequent, and turned them to a right. The forfeiture of his estate was therefore a proper punishment upon him for attempting to do an act of inconsistent with his tenure, and calculated to injure him in the reversion. But the law will never punish a man for doing that which is not inconsistent with the nature of his estate, and which may have a legal operation. Such is the case here; for Richards stood in two several characters; that of tenant for life, with a remainder in tail subsequent to that limited to his first and other sons. This remainder in tail is all that he sought to bar; and the law says, that having the immediate freehold, and an estate tail in remainder in him, he has a right to bar it. Upon what principle then is it that a forfeiture should be incurred? Has he taken upon him to do any act inconsistent with the nature of his estate? The tenant to the præcipe is made by lease and release; this is a lawful conveyance, as it is called, and passes no more than a man lawfully may. Had it been done by feoffment, that perhaps, in respect of the manner of doing it, might have admitted of some argument; but here it was perfectly legal.

The next thing then is, Whether the recovery itself will operate so as to subject him to a forfeiture? And, as to this, we are all clearly of opinion, that it does not; because there was a legal subject for it to work upon, namely, his remainder in tail. Richards is vouched, and enters into the warranty, not in respect of his tenancy for life, but of his remainder

der in tail; and the recompence in value is supposed to go to those who would have been entitled to his estate-tail, and those who stood subsequent to them; and passes over his first and other sons, who have the first estate-tail in them. And as they CLYFFORD. receive no recompence, their estate is not displaced, nor in any manner affected by the recovery.

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It seems plain, from the words of the statute, of Elizabeth what kind of recoveries the Legislature considered as fraudulent, and meant to prohibit; for it says, " that all such reco-" veries hereafter to be had or prosecuted by agreement of the " parties or by covin, as is aforesaid, against such particular te-" nant of any lands, &c. whereof the same particular tenant " is, or hereafter shall be, seised of any such particular estate 46 as is aforesaid, or against any other, with voucher over of " any such particular tenant, &c. shall, as against those in re-" mainder or reversion, be void and of none effect." Then comes a proviso, "that nothing therein contained shall ex-" tend, or be prejudicial, to any person that shall hereafter by " good title recover any lands, &c. without any fraud or covin, " by reason of any former right or title, but that all such shall "be in like force as before the making of the act." Therefore a recovery suffered under the circumstances which exist in the present case is expressly saved. And we are all of opinion that there must be judgment for the defendant.

Postea to the defendant.

# HIBBER'I and Others against CARTER.

THIS was an action upon a policy of assurance on goods The indorseon board the ship Devonshire, at and from Jamaica to her and delivery of a London; which insurance was stated upon the head of the po-bill of lading hey to be made " on account of Robert Kerr, Esq." The to a creditor plaintiffs were merchants in London, and the general consig-prima facie plaintiffs were merchants in London, and the general courses conveys the sees of Kerr, who was a planter in the island of Jumaica. whole pro-They were in the constant habit of procuring insurance upon perty in the his goods as soon as they received advice of their being ship. goods from ped. On the 23d of December 1782, the plaintiffs received it's delivery. advice from Kerr of his having shipped ten hogsheads of su- But if the ingar on board the Devonshire, in which letter, dated 18th of tention of the October 1782, was contained a general direction to insure parties apwhatever goods were shipped by him. The insurance was been only to immediately effected; but in the month of November, between bind the net

the proceeds in case of the

arrival of the goods, then an insurance made on account of the indorser, after such indorsement, is good.

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the time when the order was sent and the time when the defendant subscribed the policy, Kerr had indorsed the bill of HIBBERT lading to one Dellprat in Jamaica, to whom there was an arrear of interest due upon mortgage on Kerr's estate in that The plaintiffs had notice of this indorsement, after the insurance was made, by a letter from Kerr to them, wherein he informed them, that he had been obliged to assign the bills of lading for the net proceeds to Dellprat. The bill of lading as it originally stood expressed the sugars to be shipped on account and risk of the shipper, and directed the delivery to his order, or that of his assigns; the indorsement was in the following terms: " deliver the above sugars to Mr. " John Hodgson, for account of S. Dellprat," signed " Robert " Kerr." The ship was lost in the course of the voyage.

At the trial of this cause at the last sittings at Guilahall, before Buller J. the plaintiffs rested their case here, and contended that upon these facts they were entitled to a verdict for the amount of the insurance. On the other hand it was objected that Kerr having assigned the bill of lading before the insurance was actually effected, the averment in the declaration, that these sugars had been insured on his account. was not true, for he had not then any insurable interest remaining in him, the entire property in the goods having passed out of him by the assignment of the bill of lading, which operated in this instance as a payment. And Buller I. being of this opinion, upon the general ground, that the indorse. ment of a bill of lading passed the whole property, would have nonsuited the plaintiffs; but it appearing that the defendant had neglected to pay the premium of twenty guineas into court, the plaintiffs took a verdict for that sum.

Upon a motion on the part of the plaintiffs in this term for

a new trial,

Erskine and East contended, that the verdict, ought to have been taken for the whole sum insured. The indorsement of the bill of lading only bound the consignment of the goods in England, and cannot be taken to have transferred the whole property out of the consignor in the mean time. He was answerable again to Dellprat for the amount of the sugars, in case they did not arrive safe; the bill of lading was put into his hands merely as a collateral security for the debt; he was only to receive the net proceeds; and therefore it cannot be said to be a payment upon the spot, for it is not certain

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ain what the net proceeds will be. If so, there did remain an insurable interest in the consignor, for he was to run the risk of the voyage. The case of Culdwell and Ball (a) went HIBBERT no further than to determine that the indorsement of a bill of lading bound the consignment. The principal dispute between the parties was, who should get the consignments of an estate in the West Indies. It is evident from the very terms of this bill of lading, that the risk of the vovage was to be run by the shipper; for, upon the face of it, the goods are expressed to be shipped " on account and at the risk of the " shipper;" and the indorsement, only directing the delivery to be " on account" of another person, leaves the risk as it was before. But, admitting that by the general law the indorsement of a bill of lading does transfer the whole property out of the consignor, yet the consignor may recover from the under-writer as a trustee for the person really entitled. doctrine seemed to be admitted in the case of Delaney and Stoddart (b), which was stronger than the present; for there, there had been an actual sale of the ship insured between the time of sending the order for insurance, and the time when the insurance was actually effected; and there, the action was held to be sustainable against the under-writer in the name of the vendor, though in reality for the benefit of the vendee; so here perhaps the inducement for taking the bill of lading, if it is to be considered as an absolute transfer of the property, was the idea of security from the goods being insured.

The Court however, upon this occasion, were all clearly of opinion that where a bill of lading is taken by a creditor as a security for his debt on his own account, the whole property passes by the delivery, and is to be considered as a satisfaction of the debt pro tanto. That the parties were always at liberty to vary from the general rule, by entering into any particular agreement between themselves; but that it must be shewn in order to take advantage of it. They considered the case of Caldwell and Ball as deciding the general question. And as to the case of Delaney and Stoddart, there was an agreement that the policy should be transferred. They therefore refused the rule.

But afterwards on a subsequent day the motion was renewed by leave of the Court, on an affidavit stating the particular transaction between the parties; That Kerr had no intention whatever of passing the whole property by the indorsement of the bill of lading; his intention being no more than to bind the consignment of the goods in England; to which purpose

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he had ordered his correspondents to pay the net proceeds to Dellprat, as appears by the letter before mentioned; and that since that time Kerr's executor had actually accounted to Dellprat again for the amount of the sugars which had been lost, a demand having been made on them to that purpose. A rule was now granted to shew cause why there should not be a new trial; which was afterwards made absolute without hearing either side (a).

(a) The cause came on to be tried a second time at the sittings after Base Term at Guildball, when, the same clear evidence of the intention of the parties being given as had been set forth in the affidavit laid before the Court, Mr. Justice Buller was of opinion, that the plaintiff was entitled to recover the amount of the insurance. He said the general doctrine was clear, that the indorsement of a bill of lading prima facie transferred the whole property in the goods; but this was subject to be controlled by the evident intention of the parties. Here advice was sent by the consignor to his correspondents at home that he had been obliged to give the bill of lading to Dellprat for the net proceeds, and the amount of the goods was actually accounted for again by Kerr's executors to Dellprat after the loss was known. And besides, what was material to be observed, no value had been put upon the goods at the time, which shewed that Dellprat was only to have the set proceeds.

Verdict for the plaintiffs (6).

No motion was made for a new trial.

(b) Vide Godin v. The London Assurance Company, 1 Burr. 489.

Tuesday, May 15th.

## J'ANSON against STUART.

To print of any person that he is a swindler is a libel, and actionable. om of such a charge must state the particular instances of fraud, by which the defendant means to support it.

HIS action was brought in the Common Pleas for a libel printed in the Morning Post, which was stated in the declaration with innuendos as follows:

"The public cannot be too frequently cautioned against "notorious swindlers and common informers. A nest of A justificati-" these hornets" (meaning the notorious swindlers and common informers,) " who live by sucking the honey produced "by industrious bees, have lately been discovered dividing "the spoil at their nest in the corner of the king's road," meaning the dwelling-house of the plaintiff, " from whence" (meaning the said dwelling-house of the plaintiff) "they" (meaning the said notorious swindlers and common informers) "have heretofore" (meaning before the said time of printing and publishing the said libel) " issued to sting the "unsuspecting" meaning to insinuate and be understood thereby that the said plaintiff was illegally, fraudulently and dishonestly concerned and connected with divers swindlers and common informers, and shared with them the spoil and plusder by them from other persons unlawfully, fraudulently, dishonestly, and by swindling, gotten and obtained). " The head "of the gang" (meaning the plaintiff, and also meaning therepy

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Thereby that the plaintiff was the principal and head of the gang of the said swindlers and common informers) "possesses in a strong degree the attribute of a gentleman, called the Devil, who first seduces, then stimulates, and at last deceives, and leaves his dupes to punishment" (meaning thereby and intending to be thereby understood that the plaintiff was guilty of deceiving and defrauding divers persons, with whom he had dealings and transactions, and that he the plaintiff was not to be trusted.) "This diabolical character," (meaning the plaintiff,) "like Polyphemus the man-eater, has but one eye, and is well known to all persons acquainted with the name of a certain noble circumnavigator" (meaning by the said last mentioned words to allude to the name of the plaintiff Janson, and meaning thereby and intending that it should be thereby understood that the said false, scan-

The defendant pleaded that the plaintiff had been illegally, fraudulently, and dishonestly concerned and connected with, and was one of, a gang of swindlers and common informers, and had also been guilty of deceiving and defrauding divers persons with whom he had had dealings and transactions,

dalous, malicious, and libellous words, were applicable to, and published of and concerning, the said W. ?'Auson).

wherefore he printed and published, &c.

To this plea there was a special demurrer, and the following causes were shewn; that the defendant hath not set forth or shewn in or by his plea in what manner the plaintiff was illegally, fraudulently, and dishonestly concerned and connected with, and was one of, a gang of swindlers and common informers; and also that the defendant hath not thereby shewn or disclosed any particular person or persons with whom the plaintiff was so illegally, fraudulently, and dishonestly, concerned and connected; and also that the defendant has not shewn or disclosed any particular person or persons with whom the plaintiff hath been guilty of deceiving or defrauding, or in what manner, or in what particular dealings and transactions, he hath so deceived and defrauded any such person or persons; and also that the defendant hath not in or by his plea set forth any day or time when the said several facts alleged by him in that plea against the plaintiff or any of them happened; and also that the defendant has set forth the charges in that plea contained in so general and uncertain a manner, that the plaintiff cannot know what particular facts the defendant will attempt to establish by evidence on the trial of this cause in order to support those charges, and therefore cannot be prepared to disprove or answer the same.

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After argument on this demurrer, the court of Common Pleas (a) gave judgment for the defendant. The record was then removed into this court by a writ of error; and the errors assigned were similar to the causes of demurrer.

Wood, for the plaintiff, insisted that the plea of justification was too general and uncertain, because it did not sufficiently apprise the plaintiff of the defence which was intended to be The defendant ought to have alleged some particular crime, with the time, the place, and the persons with whom the plaintiff was supposed to be connected. A similar justification was attempted to be pleaded in the case of Newman v. Bailey (b). That was an action by a justice of the peace against the defendant, who charged him with "pocket-" ing all the fines and penalties forfeited by delinquents whom " he convicted, without distributing them to the poor, or in "any other manner accounting for a sum of 50% then in "hand." The defendant pleaded that "the plaintiff was a justice of the peace, and that, during the time he acted as such, he convicted divers and sundry persons respectively in divers and sundry fines and sums of money, for and on pretence of their having respectively committed divers respective offences, against the form and effect of divers statutes of this realm; which said respective fines and sums of money, amounting in the whole to 50l. he received of the respective delinquents so by him convicted, and had not paid the same to the several persons to whom the same ought to have been paid by virtue of the respective statutes, but had kept and detained the same, contrary, &c." To this there was a special demurrer; and the Court were clearly of opinion that the justification was bad, because it did not specify any one fine or penalty which had been unjustly levied.

Conste for the defendant. The plea may be as general as the declaration; and, in the present case, the plea denies the whole charge. This is distinguishable from the case cited; for there was a specific charge that the plaintiff had taken certain fines which belonged to the king, and the justification was general. But here the point in issue was the whole life and character of the plaintiff; therefore it would have been to no purpose for the defendant to have specified any one particular instance, because that would not have been sufficient to prove the charge in the declaration. And if the defendant had set forth many instances, he probably might have failed in the proof of one, and then his justification could not be supported.

(a) H. 27 G. 3, C. B.

(b) H. 16 G. 3, B. R.

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supported. And besides, if it were necessary to specify all the charges, it would be making the record itself a libel. Pleas of justification need not be drawn with more precision J'Anson and certainty than indictments: And there are several instances where a general charge of this kind is sufficient even in an indictment, such as charges of barratry; or keeping a common bawdy.house. 1 Hawk. P. C. 2 Hawk. P. C. c. 25. s. 59. In 2 Atk. 339. it is said, that in the case of an indictment for keeping a common bawdy-house, without charging any particular fact, though the charge be general, yet at the trial the prosecutor may give in evidence particular facts and the particular time of doing them; the same rule as to keeping a common gaming-house. So a general charge for keeping a disorderly house was held sufficient. 2 Burr. 1232. In the present case, the being a swindler consists in divers acts; and therefore it was sufficient for the defendant to plead the charge generally, and give the particular facts in evidence. But if it be not now too late to take any exception to the declaration, that appears to be informal and insufficient. charges the defendant with having called the plaintiff a common informer and swindler: Now the former is not actionable and the latter is not a legal term of which the law can take notice. It is true, indeed, that they are explained by innuendos to mean defrauding and plundering: but the terms themselves are not capable of that explanation; therefore the defendant has a right to throw out the innuendos, and consider the charge itself. And if the matter be not actionable, the manner is not material. Astley v. Young, 2 Burr. 811. Besides, the libel is not sufficiently descriptive of the person of the plaintiff.

Wood in reply. The true nature of a plea is to disclose to the plaintiff the particular facts, which are meant to be given in evidence against him: but this plea is so general that the plaintix cannot be prepared to answer it. As to the charge in the declaration being too general, it is to be observed that it is the charge of the defendant. And if it were not actionable on account of its generality, any person might calumniate another with impunity by generally scandalising his cha-This has been compared to an indictment for keeping a common hawdy-house, where it is said that a general allegation is sufficient: but even there the house itself must be specified; the time and the acts done are only the evidence of keeping an improper house. Suppose the plaintiff had been indicted for swindling, it would not have been sufficient

T'A NSON against STUART. to state, as this plea does, that he had been guilty of defrauding divers persons: but the indictment must have stated whom he had defrauded, and the time when. So an indictment generally for felony is not sufficient; it must allege the particular species of felony. Therefore on the defendant's argument this plea cannot be supported. Then as to the declaration not being sufficient: It is actionable to charge any person with that which may be the subject of an indictment. And there is no doubt, but that if the charge against the plaintiff were true, he might have been indicted for it. And even though certain words, which scandalise the character of another, be not actionable in themselves, yet if they be reduced to writing, they become the subject of a libel. Austin v. Culpepper, 2 Show. 313. And the innuendos are explanations in fact, which are admitted on this record.

ASHHURST, J. This plea is bad on account of its generality. The substance of the libel is that the plaintiff was a common swindler, and that he, in concert with others, defrauded divers persons. One part of the defendant's argument has been that this plea is only as general as the charge in the declaration. But it is to be observed, that it was the charge of the defendant, and the plaintiff was bound to state it as it was made. And it does not follow, that the defendant ought to justify in so general a way. The defendant is prima facie to be considered as a wrongdoer. When he took upon himself to justify generally the charge of swindling, he must be prepared with the facts which constitute the charge in order to maintain his plea: Then he ought to state those facts specifically, to give the plaintiff an opportunity of denying them; for the plaintiff cannot come to the trial prepared to justify his whole life. If the plaintiff had been a common swindler, the defendant ought to have indicted him; but he has no right to libel him in this way. And if the defendant has acted wrong in libelling the plaintiff, he has brought this difficulty upon himself: But where a man stands forth as a public prosecutor, he is entitled to the protection of the public. In some few cases, a general charge in an indictment may be sufficient; but those of barratry and keeping a disorderly house are almost the only instances. The latter case may be supported without mentioning the name of any individual who frequents the house, because it may be notorious to the neighbours that disorderly persons do go there, without their being enabled to specify any particular person.

But where a charge of this kind is preferred, it must be more particular in order to apprise the other party of it. Now here if the defendant can support his charge that the plaintiff has defrauded divers persons, it must be known to him whom he has defrauded, and he must call them as witnesses to prove the particular acts of fraud: If he cannot substantiate his charge, he ought not to have made it.

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substantiate his charge, he ought not to have made it. BULLER, J. It seems to me that the argument of the defendant's counsel blows hot and cold at the same time. For, first, it is said that the term "Swindler" imports a variety of acts of fraud, and therefore, that they could not be stated in the plea, because it would be multifarious. But the objection afterwards taken to the declaration is that the term "Swindler" is too general, and cannot be legally understood. But Mr. J. Aston formerly held otherwise, for he said that the word "Swindler" was in general use, and that the Court could not say, they were ignorant of it. But at all events, we cannot say on this record that we do not understand the import of it, for it is explained to be "defrauding divers persons." The first question then here is, Whether the defendant is at liberty to charge the plaintiff with swindling, without shewing any instances of it? That is contrary to every rule of pleading: for wherever one person charges another with fraud, he must know the particular instances on which his charge is founded, and therefore ought to disclose them. The rule in pleading is this, that wherever a subject comprehends multiplicity of matters, to avoid prolixity, a generality of pleading is allowed; as a bond to return all writs, &c. But if there be any thing specific in the subject, though consisting of a number of acts, they must be all enumerated; as on a covenant "to infeoff of all his lands," the covenantor in shewing performance must state them all; so if a person be bound "to pay all the legacies in the will," he must specify them all, and aver payment of each; and the reason is, because all these facts lie within the knowledge of the party (a). Now in the present case, if this plea were to be suffered, it would be to allow any person to libel another more on the records of the Court than he could do in a public newspaper. If the plaintiff has been guilty of any acts of swindling, the defendant must be taken to know them. He could not prove the justification, as he has pleaded it, by general evidence; but he has no justification, unless he can prove the special instances; and, knowing them, he ought to put them on the record that the plaintiff might be prepared J'Anson
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to answer them. It has been said, that this case is different from that of Newman v. Bailey, because that was a specific charge. But that is not so; for there the plaintiff was charged with pocketing all the fines, &c. which was as general as possible. And there the Court said it was necessary to specify the particular acts. The cases of indictments, which were cited, do not apply here. As to that of barratry, it has always been stated as an exception to the general rule: I have not been able to discover how that exception was first established; but it is of ancient date. But in that case something more is required than is stated in the present case; for though the indictment is good in a general form, yet it has always been held that the prosecutor must give the defendant notice before the trial of the particular instances that are meant to be proved, so that even there the inconvenience of allowing a general charge is guarded against. With respect to the case of an indictment for keeping a common bawdyhouse; there more certainty in the indictment is required than is stated here; for it must state the place where the house is situate and the time; the crime therefore is particularly stated in that case, for the offence is the keeping of the house: And it is not necessary to prove who frequents the house, for that may be impossible; but if any unknown persons are proved to be there behaving disorderly, it is sufficient to support the indictment. So in the case of a common scold, it is not necessary to prove the particular expressions used; it is sufficient to prove generally that she is always scolding. Therefore in all these instances, the party is sufficiently apprised of the nature of the charge which is intended to be proved against him. It is not true, as was contended, that the general character of the plaintiff is put in issue; for the evidence to support the defendant's plea must be special. Where it is permitted to the party to give general evidence of character, as in the case of a prisoner, he cannot enter into particular instances: but where, as in the present case, the whole defence arises from the proof of particular facts, the general character is not in issue. Then as to the declaration itself, it contains as libellous a charge as can well be imagined.

GROSE, J. declined giving any opinion, as he had argued this case at the bar in the court of Common Pleas.

Judgment reversed.

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GOODTITLE on the several Demises of EDWARD Tuesday, NORRIS, J. BLAGDEN HALE, JOSEPH PAR-May 15th. TINGDON, and EDWARD JEFFERY, and MARY his WIFE, against JOAN MORGAN Widow, and RI-CHARD DAVID.

E JECTMENT for lands at *Penmarke* and *Porthkerry*, A second Glamorgan, tried before Hotham, Baron, at the last mortgagee, Hereford assizes. Verdict for the plaintiff, subject to the an assign-

epinion of the Court on the following case.

R. Jones, being seised in fee of the premises in question, term to atnamely, the manor of *Penmarke*, and certain lands in *Porth*-tend the inheritance, kerry in Glamorganshire, by indenture of demise, dated 14th and has all April 1761, granted them to Margaret Aubrey for nine hun-the title dred and ninety-nine years, subject to a proviso for redemp-deeds, may recover in tion, on payment of 5000l. and interest at a day therein men-ejectment tioned; which sum was not paid at the day. On the 16th of against the August 1768, by indenture of assignment of four parts, be-first morttween Margaret Aubrey of the first part, R. Jones of the se-gagee, not having had cond part, John Lockwood and R. Morris of the third part, notice of and Richard Lockwood of the fourth part, Margaret Aubrey, such prior in consideration of 71941. 14s. due to her from Jones, for mortgage.

principal and interest on the mortgage of 14th of April 1761, and also on bonds, and which was paid her by the said John Lockwood and Robert Morris by the direction of Jones, by the like direction of Jones and nomination of John Lockwood and Robert Morris, assigned all the premises comprised in the indenture of demise of the 14th of April 1761 to Richard Lockwood, his executors, &c. for the residue of the term of nine hundred and ninety-nine years, in trust, as to the manor of Penmarke, for Robert Jones, and, in the mean time, to attend the inheritance, and as to the other lands in Porthkerry, comprised in the deed of 1761, in trust for John Lockwood and Morris. By indenture of assignment, dated 13th of December 1769, Robert Jones and Richard Lockwood assigned all the premises in question to Richard Morland, his executors. &c. for the remainder of the term of 999 years, in trust for Nathan Sprigg, for securing 10,000/. lent by Sprigg to Jones. By indentures of lease and release, 14th and 15th December 1769. Jones mortgaged the premises in fee to Sprigg for securing the 10,000l. On the 9th of June 1777, Sprigg by his will appointed Richard Morland and Edward Norris, one of

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the lessors of the plaintiff, executors. Morland is since deal having appointed foseph Partingdon and J. Blagden Hel, two others of the lessors of the plaintiff, executors. Mary, the wife of Edward Jeffery, the other lessor of the plaintif, is the heir at law of Sprigg the mortgagee. The two defeadants who defend separately for different premises, but which are all in mortgage to Sprigg, set up mortgages in fee from Robert Jones, prior to that of Sprigg. The defendant, Jon Morgan, claims under a mortgage in fee of the manor of Penmarke by Jones to W. Morgan, dated 3d and 4th of And The other defendant, Richard David, claims under 2 mortgage in fee of the lands in Porthkerry by Jones to him, dated 27th and 28th of July 1769. Both the desendants at in possession by ejectments brought upon their several mort-At the time of the mortgage to Sprigg, all proper searches were made on his part for incumbrances, and he had all the title deeds that could be found delivered to him at the time he advanced his money, except the demise of the 14th of April 1761, and the assignment of the 16th August 1768, which were kept in the hands of John Lockwood, on account only of their containing other premises in mortgage to John Lockwood, and which were not included in the mortgage to Spring, nor assigned to Morland his trustee, but counterparts of them were then delivered to Sprigg. The question for the opinion of the Court is, Whether the lessors of the plaintil are entitled to recover the premises contained in the two mortgages set up by the defendants?

Worrall for the lessors of the plaintiff, after premising that the title of the defendant Morgan was different from that of the other defendant, inasmuch as it arose previous to any saign ment of the mortgage term to Richard Lockwood the trustee, stated the question to be, Whether the term, assigned to the trustee to attend the inheritance for the mortgagor, shall be considered to pass by the release of the mortgagor only, the trustee not being a party to it? Wherever a term is created for the purpose of raising money, and the mortgage is forfeited, the term will afterwards continue in the mortgagee, not withstanding the mortgage money is paid. It is true, indeed, that the mort gagor may redeem in equity on payment of principal, interest, and costs: but still the legal estate continues in the mortgages, and must be so considered in a court of law. Here the legit term was in Morland the trustee. The term was first created in Aubrey by Jones; it continued in Aubrey till her mortgage wis

paid off, when she assigned to Richard Lockwood in trust for Yones to attend the inheritance: but still it was subject to the appointment of Junes, and he afterwards did in fact assign to Goodfile Morland in trust for Sprigg, under whom the plaintiff claims. Terms in gross and terms to attend the inheritance at common law are the same thing: As long as they exist, the owner of the soil is kept out of the legal estate. And though the use and benefit of the term are for the cestui que trust, yet the legal estate is in the trustee. With respect to terms to attend the inheritance, there is no distinction between those expressly created by the party, and those arising by construction of a court of equity. The only case to warrant any such distinction is that of Oxwick v. Brockett (a); but the authority of that case is doubtful, for the decree is not entered in the register's book. It is no objection that such terms, if not at all events to attend the inheritance, will descend differently: That argument was urged in the Duke of Norfolk's case (b); but the owner of the soil may sever them. Hayter v. Rod, 1 P. Wms. 360. The legal estate not being in Jones at the time of the mortgages to the defendants, and the trustee of the term not having joined in the conveyances, the defendants acquired no legal title. But the legal title was afterwards conveyed by the deed of 13th December 1760 to Morland in trust for Sprigg, under whom the lessors of the plaintiff claim. And Spring had not merely a good legal title, but he had also a good equitable title; he is a bona fide purchaser without notice, he is in possession of the title deeds, and has an assignment of the mortgage term. And the rule in equity is, that where there are several claimants in equal degree, the one who has the legal title shall be preferred. Where a mortgagee lends money on mortgage, he is party to a fraud unless he takes the title deeds, because by those means he enables the mortgagor to mortgage the same estate to a subsequent mortgagee. is for that reason that a puisne incumbrancer is permitted to obtain an outstanding term and exclude a prior incumbrancer. Marsh v. Lee, 2 Ventr. 337. Willoughby v. Willoughby, Tr. 30 G. 2. Butl. Co. Lit. 293. b. n. (c). Stanhope v. Lord Verney, ib. Where a term is attendant on the inheritance, and the owner of the inheritance levies a fine, though the trustees of the term are thereby barred, and can never afterwards claim any thing, Eccee

<sup>(</sup>a) 1 Eq. Cas. Abr. 355.
(b) Cb Cas 46.
(c) Cor. 1.ord Hardwicke in Chancery, 1736. See the next case?

Good-TITLE against Morgan. yet it may be set up to support incumbrances. Carth. 100. The counsel then cited 2 Vern. 524, 599. 1 Ch. Cas. 201. 35. 1 Vern. 187, 8. and 3 P. Wms. 330. to shew how purchasers may protect themselves against prior incumbrances; they may even protect themselves by procuring an assignment of the term pendente lite. 2 Vez. 571.

Nicol, for the defendants, admitted the authority of the cases cited, but observed that they were not applicable here; for though it be indisputably settled that a court of equity would not interpose between parties, whose claims are equal in equity, to take away any advantage which either party might have, yet the question here is who has the legal title. It is extremely clear, that when Lord Hale laid down the rule in the case of Mursh v. Lee, that a prior legal term outstanding should have the preference, courts of law were not so liberal in assisting equitable titles in ejectment: But it has been established since that time, that a legal term outstanding in a trustee shall never be set up against the cestui que trust. In Doe dem. Bristow v. Pegge (a), it was held, that where a legal term was created for a particular purpose, if that purpose were satisfied, or if it were upsatisfied.

Vide post, 2 wol, 684. contra. (a) E. 25 Geo. 3. B. R. Doz on the demise of BRISTOW against Pegge.

Ejectment was brought for a moiety of the manor of Winkowne, &c. under the will of D. Burnell, as one of his co-heirs. By the testator's marriage settlement in 1748 two terms in trust were created; one for ninety-nine years, to secure an annuity of 2001 to his mother; the other for one thousand years, for raising 3000/ for his wife, in case she should have no issue; the money to be raised out of the rents and profits, or by sale or mortgage. The testator died a 1774, having no issue, and devised all his estates to trustees and their hers, to the use of them and their heirs in trust, after the death of his widow, who was entitled to a life estate under the marriage settlement, for such person or persons as according to the laws of descent should be his heirs at law, and the heirs at their bodies, to take as tenants in common, &c. if more than one. The defeadant filed a bill in chancery in 1.76 against all persons who were supposed to have any claim as heirs at law, and against the trustees, and an issue was directed a der which he was found heir at law by descent from a daughter of a common ancestor. The lessor of the plaintiff also had filed a bull in 1783, his claim having never been known before; but upon the death of the widow, be brought this ejectment, and proved his pedigree from another danghter of the same common uncestor. At the trial, the defendant set up these terms; the testator's mother being still living, and her annuity regularly paid by the receiver appointed by the court of Chancery; the 3001d, having likewise been raised for his widow, and the term assigned in mortgage.

Mr. Justice HEATH, who tried the cause at the last assizes at Nottingbom, nonsuited the plaintiff, with leave to move to set aside the nonsuit, and enter a verdict for the plaintiff, if the Court should be of opinion that he was entitled to recover.

Upon the motion, it was stated that the receiver had been appointed by the court of Chancery during the life of the widow, and for such premises only as her life estate did not extend to; and that the less of the plaintiff did not desire to disturb the term, but was ready to partake of the charge.

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satisfied and not connected with the litigating parties, it should neverbe set up between them in ejectment; but should be considered.

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Wilson, Dayrell, and Brough, for the plaintiff. As these parties claim from the same common ancestor, under one and the same title, one of them ought not to be permitted to set up these terms against the title of the other, since he himself is permitted to shew his title, subject to the same incumbrances. Such an objection ought on no account to prevail as between these parties; and the possession of one tenant in common is the possession of both.

The annuity not being in arrear, the trustees of the term of ninety-nine years themselves could not recover possession. Besides, a trust estate should never be set up against the restui que trust. And as to the remainder after the terms are satisfied, there is a resulting trust, and the termors are trustees for the heir at law. Nay, till default of payment of interest, or the money raistd, the terms are in trust for the heir at law. An ejectment is in the nature of a feigned issue, and merely intended to try the real title. In the case of Lade v. Holford and Another, Bull. Nisi Prius, 110. Lord Mansfield declared, that he and many of the judges had resolved never to suffer a plaintiff in ejectment to be nonsuited by a term standing out in his own trustee, or a satisfied term to be set up by a mortgager against his mortgage, but to direct the jury to presume it surrendered.

So in the case of White ex dem. Whatley v. Hawkins, M. 14 Geo. 3. Bull. Wisi Prius, 96. and Dougle 23. n. 7. it was held, that a mortgagee need not give notice to a tenant to quit before ejectment brought, if he mean only to get into the receipt of the rents and profits, and not to dispute the title of the tenant. Mosev Gallimore, Dougl. 265. In this instance, the lessor of the plaintiff is wil-

hing to admit the charge of these terms, and take subject to them,

Balguy and Gally, contra. If a tenant in common hold adversely, an ejectment will lie: but the defendant does not hold adversely, and the terms set up are no part of the title of either party, but paramount to both. The purposes for which they were created have arisen, and are subsisting. If an ejectment were such an issue as is contended, the doctrine of terms would be extinguished, and all differences by reason of such being outstanding, at an end. The rule is, that a plaintiff in ejectment must recover by the strength of his own title, Bull. Nisi Prius, 208; and must shew a right of possession, 1 Burr. 119. These terms being unsatisfied, the plaintiff is not entitled to the possession. It is true that a satisfied term cannot be set up, Dougl. 695. But the only cases where uneatisfied terms cannot be set up, are against cestui que trust, in a clear case, or against those under whom the defendant claims. But if the trust be doubtful, the Court will leave the party applying to his remedy in equity.

They also cited a case before Ashburst, Justice, at Leicester summer assizes 1784. White ex dem. Henson v. Beaumont, which was an ejectment brought by a devisee against the heir at law, who produced a mortgage term, on which the

plaintiff was nonsuited; that being deemed a complete bar.

Lord Mansfield, Ch. J.—An ejectment is a fictitious remedy to try the title to the possession of lands; it is of infinite consequence that it should be adapted to attain the ends of justice, and not entangled in the nets of form. Great difficulties have arisen as to the legal form of passing land, from the modes of conveyancing in England since the statute of uses. Trusts are a mode of conveyance peculiar to this country. In all other countries, the person entitled has the right and possession in himself. But in England, estates are vested in trustees, on whose death it becomes difficult to find out their representatives; and the owner cannot get a complete title. If it were necessary to make assignments of satisfied terms, terrible inconveniences would ensue from the representatives of the trustees not being to be found. Sir E. Northey's clerk was trustee of near half of the great estates in the kingdom; on his death it was not known who was his heir or representative. So that where a trust term is a mere matter of form, and the deeds were muniments

deredas if it had never been created. In the present case, this is a term attendant on the inheritance; it must be considered as GOODTITLE belonging

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MORGAN. of another's estate, it shall not be set up against the real owner. It is therefore settled, that a satisfied trust shall be taken to be a trust for the benefit of the beir at law. A trust shall never be set up against him for whom the trust was intended. It is a more form of conveyance. And it is admitted, that where the term is in trust for the benefit of the lessor of the plaintiff, the detendant shall not set it up in ejectment as a bar to his recovery.

> To go a step further; third persons may have titles, and therefore, the Court say, that where there is a tenant in possession under a lease, which is a bar to the recovery of the lessor, he being to recover by the strength of his own title. yet to preyent this from being turned improperly against the person entitled to the inheritance, whose right is not disputed by the tenant, if the lessor dispute the property only against another, and give notice to the tenant that he does not mean to disturb his tenancy, the Court will never suffer the tenant to set up the

lease as a bar to the recovery,

There is another distinction to be taken; whether, supposing a title superior to that of the less or of the plaintiff exists in a third person who might recover the possession against him, it lies in the mouth of a defendant to say so in answer to an ejectment brought against himself by a party having a better title than hisown. I found this point settled before I came into this court, that the Court never suffers a mortgagor to set up the title of a third person against his mortgagee. For he made the mortgage, and it does not lie in his mouth to say so, though such third person might have a right to recover possession. Nor shall a tensue who has paid rent, and acted as such, ever set up a superior title of a third person against his lessor, in bar of an ejectment brought by him; for the tenant derives his title from him. Laying down these principles, let us now see the application of them to this case. There are disputes between the plaintiff and the defendant, who are co-heirs; as such the plaintiff claims half of the property, and wishes to be admitted into possession of the premises with the defendant. He proves his descent. Then what is the defence set up? A trust for a third person, an annuity, is set up. The plaintiff admits the charge, and says, that he only claims subject to the incumbrances. The trustees do not assert their title. Then shall others be admitted to set it up? It is clear that the other co-heirs shall not be permitted to dispute the title with him. He and the defendant have an equitable title as renants in common, and the plaintiff must recover a moiety.

WILLIS, J concurred.

Ashhurst, J In such a case as this a legal bar shall never be set up in eject. ment against the justice of the case. The trustees may perform their functions as well, after both the parties are in possession. The old doctrine is relaxed in many, instances.

BULLER, J. I entirely agree with my lord. An objection has been taken at the bar, that the plaintiff in ejectment must recover by the strength of his own title: the old cases certainly say so; but for the last forty or fifty years, constant exceptions to this rule have been admitted. One case which is received as clear law, and is an exception to it, is that of a tenadt who cannot set up the title of the mortgagee against the mortgagor; because he holds under the mortgagor, and has admitted the title.

There was a case before me at Guildball, and I believe another upon the Oxford circuit, of the same nature, where a lessee for years had got possession of some mortgage deeds, and endeavoured to set up that title against the mortgagor; but though this shewed that the plaintiff had no right to recover as against the mortgagee, yet I permitted him to do so in that instance; and the decision was acquiesced under.

It is not therefore true, that an outstanding unsatisfied term is always an answer to a plaintiff in ejectment. So long ago as the time of Justice Gundry, when an outstanding satisfied term was offered by a defendant in ejectment as a bar to the plaintiff's recovery, that judge refused to admit it, saying, that there

Delonging to, and part of, the inheritance; and, if separated n law, a court of equity would re-unite them. Whitchurch y. Whatchurch, 2 P. Wms. 236, 2 Wils. 329. The cestui que trust Goodfitte is the complete owner, and his disposition is the disposition of the land. And the trustee is considered merely as an instrument of conveyance. Burgess v. Wheate, 1 Black. Rep. 162. Now to apply these principles to this case; the term was created in 1761; in 1768 the mortgage money was paid off, and the term was assigned in trust for Janes and his heirs, to be disposed of as he should appoint, and in the mean time to attend the inheritance, and to protect it against mesne incumphrances; in 1767 Jones mortgaged to one of the defendants, and in 1769 to the other, both of them being prior to the mortgage under which the plaintiff claims. At the times of the respective mortgages to the defendants, the trustee of the term became the trustee of the defendants, and the term could not be separated from the inheritance without his consent: And if previous to the conveyance to Sprigg in 1769 the defendants had brought ejectments upon their mortgages, neither Jones nor Richard Lockwood his trustee could have set up this term as a bar to their ejectments. Then if Jones. himself could not set up the term, it seems to be absurd to say that those who claim under him can; for they cannot claim a greater estate than he had. Then Jones, having parted with the inheritance, had no power afterwards to make any appointment of it differently. His power was gove, though it were collateral, by the conveyance of the land (a). With respect to the charge of fraud against the defendants, it is to be observed that the mortgagor has alone been guilty of

was no use in taking an outstanding term, but for the sake of the conveyancer's pockets: since which time it has been the uniform doctrine, that if the plaintiff be entitled to the beneficial interest he shall recover the possession. The next objection is, that this is a reversionary interest; but that is not mate, rial; for it has been further ruled of late years, that a lesson of a plaintiff may recover in an ejectment a reversionary interest, subject to a lease and right of present possession existing in another.

The annutant is only entitled to her 2001, per annum; and not to the possession itself whilst there is no default: indeed she does not require it. But the heir at law is entitled to the possession subject to that charge. The annuitant however is in a different situation from the mortgagee; for the latter is entitled

to receive the whole in diminution of the principal and interest.

So that the plaintiff must have a general judgment for that part which is not in the possession of the receiver; and as to that which is, he must enter into a rule not to disturb that possession; submitting to the mortgage and the annuity. Rule absolute.

(a) 1 P. Wms. 778.

fraud; and though he could not be punished criminally for it yet those who claim under him, shall not be benefited by if Goodfire So if a parson be simoniacally presented to a church, he shall not enjoy the church; neither shall a bankrupt, who obtain his certificate fraudulently, avail himself of it. As to the case of Willoughby v. Willoughby, it was determined at a time when it was not so well understood, as at present, how far are outstanding term could be set up. The case in 1 P. Wms. 360. turned on the intention of the owner of the inheritance to sever the term. The same observation applies to the case in 3 Ch. Cas. So in the case of the fine; as it was the intention of the parties to bar the term, though it was not satis-

fied, yet it might be set up by a purchaser.

ASHHURST, J. No man ought to be so absurd as to make a purchase without looking at the title deeds; if he is, he must take the consequences of his own negligence. If the first mortgagee had used ordinary precaution, he must have known that this term was then outstanding. And if he did know of it and neglected to take an assignment of it, it was enabling the mortgagor to commit a fraud by mortgaging the wame estate again. By this therefore he became particeps criminis; and he may suffer for the consequences of the fraud, and the lessors of the plaintiff claiming under Sprigg, who have got the legal estate, must be preferred.

BULLER, J. It is an established rule in a court of equity that a second mortgagee, who has the title deeds, without notice of any prior incumbrance, shall be preferred; because if a mortgagee lend money upon mortgage without taking the title-deeds, he enables the mortgagor to commit a fraud. If this has become a rule of property in a court of equity, it ought to be adopted in a court of law. Here the defendants took mortgages, without enquiring after the title deeds; the subsequent mortgagee is a purchaser without notice; and as he has taken the title-deeds, he has the better title.

Grose, J. declared himself to be of the same opinion.

Postea to the plaintiff (a).

(a) Vide 2 Brown's Cha. Ca. 650.

We were favoured with the following Case fron the M. S. Notes of Lord Chancellor Hardwicke.

ORD Chancellor Hardwicke delivered his opinion in this If a subse-

In Chancery, June 19th, 1756.

#### WILLOUGHBY and Others against WILLOUGHBY and Others.

■ case as follows: quent pur-George Willoughby, the husband of the plaintiff Jane, be-chaser or mortgagee ing seised in fee, subject to a mortgage-term for years, on bas notice of the 12th November 1717, in consideration of, and previous to, a former his marriage with the plaintiff, entered into articles to settle purchase or the estate to the use of himself for life, then to secure a join-brance, he ture of 350l. per annum to the plaintiff Jane, remainder to shall not the first and other sons of the marriage in tail-male, remain-avail himder to George Willoughby in fee, with power to charge the self of an premises by deed or will with 2000/ for younger children? assignment premises by deed or will with 3000% for younger children's of an old portions. On the 24th March 1718 settlements were made outstanding in pursuance of the articles. On the 17th August 1718 the term, prior old term was assigned to Skillyng and Poplium upon an ex- to both, in order to get press trust declared, in trust for George Willoughby, his heirs a preference. and assigns, to attend and wait upon the freehold and inherit- But if he ance of the premises, and to be subservient thereto. On the had no no-24th March 1750 George Willoughby made his will, and exe-prior purcuted his power by charging the estate with 3000% for his chase or isyounger children, and afterwards died, leaving the plaintiff cumbrance, Jane his widow, and the defendant Henry Willoughby his eld-first and best est son, together with three daughters and a younger son right to call George, co-plaintiffs with the mother. The plaintiff June for the legal was entitled under the marriage settlement to her jointure of estate, then 350l. per annum. The defendant Henry, who was tenant in assignment tail under the marriage settlement, suffered a common reco- of it, a court very, and barred the entail, and declared the use to trustees of equity and their heirs, upon trust neverthless to the use of such per- will not de-son and persons, and for such estate and estates, as he the his advan-

estate upop which there is an old outstanding term, and has notice at the same time of a certain incumbrance, prior to his own, the prior incumbrancer has the best right to call for the legal estate, and to satisfy himself of any other incumbrances upon the estate; although such other incumbrances were not known to the second mortgagee at the time he advanced his money.

said Henry Willoughby by deed should appoint. He after tage. If a wards borrowed 8701. of his mother, and by an appointment second mortmortgaged the estate to her for a term of 500 years. During his money

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all this time the old term remained outstanding in Single and Popham. But on the 15th June 1752 the defender Henry borrowed 8001. of the defendant Jeffery Cripps, as for securing it, mortgaged the premises to Cripps in fee. And on the same day Skylling the surviving trustee in the assign LOUGHBY, ment of the old term to attend the inheritance, by the direct tion of the defendant Henry assigned that term to the defedant Alexander Boote, in trust to protect Cripps's mortgen of the fee. It appeared in evidence that previous to the taking of this mortgage, and on that occasion, Cripps had id notice of the marriage articles; notwithstanding which, & took a covenant in the mortgage deed from the defendant Henry, that the premises were free from all incumbrance. except one indenture of assignment of the old term to defendan Boote and the said term and the mesne assignments thereof, the said last assignment mentioned. But it does not appear that the defendant Cripps had any notice of the mortes: made by Henry to the plaintiff his mother.

The plaintiff Jane, the mother (together with her younger son and daughters), brings this bill to have the benefit of her jointure, under her marriage settlement: and to have a sak of the estate, subject to her 350% per annum: and out of the money arising by the sale to be paid the arrears of her jointure, and next the provisions for the younger son and the daughters, and then her mortgage for 870% and the other in cumbrances in their order. The defendant Cripps, the pulse mortgagee, now submits that the plaintiff Jane's jointure me the provisions for the younger children shall be preferred; but insists that his mortgage ought to be preferred in payment to that of the plaintiff June; the legal estate of the prior term being vested in the defendant Boote, his trustee, and he being a purchaser by his second mortgage without me tice of the first; on this principle that the legal estate of the term being in a trustee for him, he has both law and equity on his side, while the plaintiff Jane has only an equity as against the term.

Two questions have been argued at the bar. First, a general question, Whether, this term having been assigned to Shylling and Popham upon an express trust declared to attend appeath freehold and inheritance and to be subservient thereto, the deferdant Cripps could in equity have had the benefit of it to protect his mortgage both against the jointure, the provisions of the younger children, and the prior mortgage, even supposing he had had no notice of any of them? Secondly, a particular question,

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question, Whether the defendant Cripps, having full notice of the marriage settlement, the jointure, and portions, and consequently not being entitled to the entire absolute benefit of the legal estate of the old term, can be preferred to the plaintiff Mrs. Willoughby, even as to her mortgage, or must come in only according to his priority in order of time?

The first question depends upon three considerations: 1st, What is the nature of a term attendant upon the inheritance? 2dly, What kind of grantee or owner of the inheritance is entitled to the protection of such a term? Or, in other words, in whose hands such a term shall be allowed to protect the inheritance? 3dly, Against what estates, charges, or incumbrances, the protection arising from such a term shall extend?

1st, What is the nature of a term attendant upon the inheritance? The attendance of terms for years upon the inheria tance is the creature of a court of equity, invented partly to protect real property, and partly to keep it in the right channel. In order to it, this court framed the distinction between such attendant terms, and terms in gross, notwithstanding that in the consideration of the common law they are both the same. and equally keep out the owner of the fee so long as they sub-But as equity always considers who has the right in conscience to the land, and on that ground makes one man a trustee for another; and as the common law allows the possession of the tenant for years to be the possession of the owner of the freehold, this Court said, where the tenant for years is but a trustee for the owner of the inheritance, he shall not keep out his cestui que trust, nor pari ratione, obstruct him in doing any acts of ownership, or in making any assurances of his estate; and therefore in equity such a term for years shall yield, ply, and be moulded, according to the uses, estates, or charges, which the owner of the inheritance declares, or carves out of the fee. Thus the dominion of real property was kept entire. Of this we meet with nothing in our books (a) before Queen Elizabeth's reign, when mortgages by long terms of years began to come into use. Before that time, the law looked upon very long terms with a jealous eye, and laid them under violent presumptions of fraud, because they tended to prevent the crown of its forfeitures, and the lord of the fruits of his tenures. Neither could there, much before that time, be any use of a term attendant upon the inheritance to preserve the limitations of a settlement in many cases, hecause the tenant for years was in the power of the owner of Fffff Vol. I.

(a) Ld. Ch. J. Pemberton's argument in the Duke of Norfolk's case, p. 24.

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the freehold, till the statute 21 Hen. 8. c. 15. which enabled him to falsify a recovery against the tenant of the freehold a till then, by such a recovery the term was gone, and consequently could attend upon nothing. But since the law was altered by that statute, and the term was preserved, this Court LOVOHBY. could lay hold of it. Proceeding upon these principles, wherever a term for years has been vested in a stranger in trust for the owner of the inheritance, whether by trust expressly declared, or by construction or judgment of this Court, which is called a trust by operation of law, this Court has said that the trust or beneficial interest of such a term shall follow or be affected by all such conveyances, assurances, or charges, as the owner creates of the inheritance. Though the law says, that the term and the fee being in different persons, they are separate distinct estates, and the one not merged in the other, yet the beneficial and profitable interest of both being in the same person, equity will unite them for the sake of keeping the property entire. Therefore, if the owner of the inheritance levy a fine sur conusance de droit, or suffer a common recovery to uses, the trust of the term shall follow and be governed by those uses, although a term for years is not the subject of a fine sur conusance de droit, much less of a common recovery; nor would equity allow the trust of a term in gross to be settled with such limitations. This doctrine is always allowed to have its full effect as between the representatives, that is, the heir either in fee-simple or fee-tail, of the owner of the inheritance, and the executor, and all persons claiming as volunteers under him; though certain distinctions have been admitted as to creditors, which are not material to the present case. And in general the rule has been the same, whether the trust of the term be created by express declaration, or arise by construction and judgment of this court. On this ground are the cases of Tyffon and Tyffon, 2 Ch. Ca. 49. and 55. and 1 Vern. 1. Best and Stamford, 2 Vern. 520. and Precedente in Chancery, 232. Hayter and Rod, 1 P. Wms. 360. Whitechurch v. Whitechurch, before the lords commissioners 1725, 2 P. Wms. 236. and Lady Dudley and Lord Dudley, Precedents in Chancery, 241, 2 Chan. Cas. 160. which was a case on the custom of London. All these cases were cited at the bar, and I choose to put them together without stating them particularly, because they all tend only to prove this general proposition. But although in all these cases this court considers the trust of the term as annexed to the inheritance, yet the legal estate of the term is always separate from it, and must be so, otherwise it would be merged. And this gives the Court an opportunity to make use of such terms, as a guard and protection to an equitable owner of the inheritance against mesne conveyances, which would carry the fee at common law; or to LOUGHBY. a person who is both legal and equitable owner of the inheritance, against such mesne incumbrances as he ought not to be affected with in conscience. And here the court often disannexes the trust of the term from the strict legal fee; but still in support of right. This brings me to the second consideration.

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2dly, What kind of grantee or owner of the inheritance is entitled in this court to the protection of such a term? Or, in other words, in whose hands such a term shall be allowed to protect the inheritance? In the first place, he must be a purchaser for a price paid, or for a valuable consideration. must be a purchaser bona fidei, not affected with any fraud or editizion. He must be a purchaser without notice of the prior conveyance, or of the prior charge or incumbrance; for notice makes him come in fraudulently. And here, when I speak of a purchaser for a valuable consideration, I include a mortgagee, for he is a purchaser pro tanto. If he has no notice, and happens to take a defective conveyance of the inheritance, defective either by reason of some prior conveyance, or of some prior charge or incumbrance, and if he also take an assignment of the term to a trustee for him, or to himself, where be takes the conveyance of the inheritance to his trustee, in both these cases he shall have the benefit of the term to protect him; that is, he may make use of the legal estate of the serm to defend his possession, or, if he has lost the possession, to recover it at common law, notwithstanding that his adversary may at law have the strict title to the inheritance. This made me say, that in those cases the court often disanmexes the trust of the term from the strict legal fee; but still in support of right. For if a man come in fairly and bona fide, and has paid a price for the land, and has acquired an estate in it which the law will support; (a plank by which at law he may save himself from sinking,) there can be no ground in equity or conscience to take it from him. the meaning of what is generally expressed by saying, that where a man has both law and equity on his side, he shall not be hurt in a court of equity. It was once doubted whether, if the term were vested in a third person, a trustee generally, and

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and not in the party himself, he should be allowed the benefit of it in equity, because the court ought to determine for whom the stranger was a trustee, and then the rule is qui prior tempore potior est jure. But this was settled by my Lord Comper in the case of Wilker and Boddington, 2 Vern. 599 & 600. LOUGHBY. He lays it down to be a rule in equity, that where a man is a purchaser for a valuable consideration without notice, he shall not be annoyed in equity, not only where he has a prior legal estate, but where he has a better right to call for the legal estate And for this reason his lordship dismisthan his adversary. sed the bill. But here I desire it may be observed, that he must have the better right to call for an assignment of the legal estate, for the sake of the use I shall make of it afterwards.

> 3dly, The third consideration is, against what estates, charges, or incumbrances, the protection arising from such a term shall extend? The answer to this question may, I think, be laid down very generally, against all estates, charges, and incumbrances, created intermediate between the raising of the term and the purchase. But here I desire to be understood to take in all the qualities or requisites before laid down, valuable consideration, bona fides, and entire fairness in the purchase, freedom from notice either express or implied, and the having of the first and best right to call for the legal estate of the term. All these must concur to warrant this protection. And here arises the distinction whereupon great stress was laid for the plaintiff in this cause, and which was much laboured: 1st, It was admitted that this will be so, where the old term is standing out in the original mortgagee or grantee of it, or his representatives, and has never been assigned to at. tend the inheritance; but that where it has been so assigned upon an express trust, it shall attend the first limitations of the inheritance, and all the estates derived out of it; it shall protect them, as here the uses of the marriage settlement, and the subsequent purchaser without notice can no ways gain the benefit of it, 2dly, That where it is so assigned upon an express trust to attend the inheritance, it is become so annexed to that inheritance, that it cannot be severed from it. the argument is not well founded. It is an attempt to establish a new distinction between a term attendant upon the inheritance by express declaration of the trust, and a term so attendant by construction or judgment of a court of equity. No authority or precedent of this court has been cited to warrant this

this distinction; and the only case where any thing of that nature appears, is to the contrary. I mean that of Oxwick and Brockett, in the Abridgment of Eq. Cas. 355. How authentic that report is, I cannot take upon me to say, for the LOUGHBY decree is not entered in the register's book, and the minutes are so imperfect that nothing material can be collected from LOUGHEY. them, except that there was an assignment of a mortgage term to attend the inheritance in the case. Let us then examine the grounds of this difference.

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First, It was urged, that where a term appears to be assigned expressly to attend the inheritance, it is notice to a purchaser or mortgagee, that there are some limitations of the inheritance to be protected by it; and, if so, the purchaser or mortgagee takes his assignment of it with notice. But I take this to be a mistake. It is notice of nothing, but that there is an inheritance to be protected, and that the term is attendant. And it does by no means imply, that the inheritance is settled or bound by special limitations; for a satisfied term may be, and often is, assigned to attend an inheritance in fee-simple, as well as a fee-tail, or an estate carved out by particular uses and limitations. It therefore gives notice to a purchaser of nothing but what he had notice of by the deeds making out the title to the fee. In this respect it is just the same as where the trust to attend the inheritance is constructive or implied. Indeed if the trust be declared to attend the freehold and inheritance, as limited or settled by such a deed, or to protect the uses of such a settlement, as is sometimes done, that will be notice of the deed or settlement, and consequently of all the uses of it, and the purchaser is bound to find them out at his peril. And I look upon this to have been the ground of the mistake.

Secondly, It was argued, that a term expressly assigned to attend the inheritance, is so connected with it that it will go along with all the uses and interests devised out of that inheritance for a valuable consideration. That where a new convevance is made of it for a valuable consideration, the trust of the term will immediately follow it, and the trustee will become a trustee for the new use. That so it was here upon the first mortgage made to the plaintiff, Mrs. Willoughby, by the defendant her son, and the surviving trustee, Skylling, could not alter the trust. I agree that it will be so against the grantor in that new conveyance of the inheritance, and his heirs. and all persons claiming from him as volunteers, or with notice. So it is in all cases where the owner creates a new estate,

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use, or incumbrance, out of the inheritance, or a charge upon it; coursesses a judgment, or a statute staple, &c. The trust of an attendant term is affected with it in like manner as the inheritance is as against the grantor and his heirs; and the purchaser or incumbrancer will receive the benefit of it in this court. But when a new purchaser for a valuable consideration comes in without notice, and with all the qualifications which I have before mentioned, and gets an assignment of the term, he comes in in a different degree; and, as he is innocent, and has paid or given the value, and has got the law with him, how can a court of equity take it from him, without contradicting all their rules? This subsequent purchaser, having no notice, stands as against the prior purchaser or incumbrancer, but in the common case.

Thirdly, It was objected further, that this is to sever the trust of the term from the inheritance, and to leave the title of the inheritance to go one way, and the trust of the term another way. That this was not in the power of the owner of the inheritance after his first conveyance, nor of the trustee, nor of both joining together. It is not necessary here to enter into the discussion of all the cases, wherein a term once attendant upon the inheritance may be disannexed, and be turned into a term in gross. It is certain that it may be done at any time by the absolute owner of the inheritance; and so it is admitted by Serjeant Maynard, in his argument of the Duke of Norfolk's case (a); or it may be made to become a terms in gross upon a contingency, according to the resolution of that case. But here is no question of severing or disannexing; for the defendant Cripps, the second mortgagee of the fee, claims the term as attendant upon the inheritance in him. this court, had he come in without notice, he must be considered as a purchaser of it, pro tanto, by his mortgage. contracted for the security of the isheritance, and paid his money for it; and though he had the misfortune ignorantly and innocently to take a defective title to that inheritance, still it is the thing he bought, and desires to protect. If this were otherwise, it would prevent every puisne mortgagee or purchaser, who has got an assignment of an attendant term, from making use of it in his defence. The argument was enforced by saying that it will put it in the power of a trustee of such an attendant term to prefer which of several incumbrancers he pleases, by assigning it over; and that this he can

(a) Page 46.

no more do than a trustee to preserve contingent remainders can be allowed in this court to join to destroy them. But this reasoning answers itself; for I take it to be just upon the same foot as the case of a trustee to preserve contingent remainders. If such a trustee join in a conveyance to a purchaser for a valuable consideration, and the purchaser has notice of Loughay. that trust, the latter is affected with the trust, and shall be decreed to re-convey the estate to the old uses. But if the purchaser comes in bona fide, and has no notice, he shall retain the estate, but the trustee shall make satisfaction for his breach of trust, in destroying the contingent remainder. is just the same here, if the puisne purchaser or mortgagee has notice of the prior purchase or incumbrance, he shall not avail himself of the assignment of the term, but shall be decreed to reconvey, or procure it to be reconveyed. If he had no notice he must retain it; but if the trustee, who joined in the assignment, had notice of such prior purchase or incumbrance, his in him; and he ought to be decreed to make satisfaction.

conscience was affected by the trust; it was a breach of trust This in my opinion is what equity would demand. To go a step further—see to what an extent this doctrine would go, if it were once admitted. It would make the assignment of such an attendant term to a purchaser's own trustees, named on his behalf, to protect him against nothing. The trust arising from the attendancy is to protect against mesne incumbrances, that is to say, mesne between the creation of the term, and the assignment of it, or the use that is made of it. But if it be allowed that wherever there is a conveyance made, or a charge or incumbrance created upon the inheritance for a valuable consideration, that draws after it so much of the trust of the term (as it really does), and that therefore a puisne purchaser or mortgagee, without notice, taking an assignment of it, takes it still bound by the derivative trust, such puisne purchaser or mortgagee can never be safe; and whether he had notice or not is nothing to the purpose; for by this doctrine it is still open to all the prior incumbran-

ces in the one case as well as in the other.

There is but one thing behind, which deserves to be taken notice of under this head: it was said to have been the general rule amongst conveyancers in making marriage settlements, or conveyances upon purchases, where they found an old term assigned upon express trust to attend the inheritance,

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not to disturb it, or take any new assignment of it to truste named by the purchaser, but to rely upon it as it is. I have enquired of a very learned and eminent conveyancer, and ce not find there has been any such general rule. If there has I confess it would have been very material, as in my lady Re-LOUGHBY. nor's case. It is true that Mr. John Ward of the Temple, wh was considerable in that branch of business, has declared it be his opinion, and he took it to be so. But how far he prac tised so, non constat; and if he did, it would not make age neral rule, which is the point to be enquired after. it to reason, it must be taken with a distinction. old term has been assigned upon an express trust to attend up on and protect the inheritance, as settled by such a deed, or the uses of such a settlement described or referred to particularly as it sometimes happens, and the conveyancer is satisfied the those uses of the inheritance have never been barred till his new settlement or purchase is made, he may very safely rely upon it, because the very assignment carries notice of the old Nav, where the assignment has been generally in trust to attend the inheritance, and the parties approve of the old trustees, they may safely rely upon it, especially in the case of a purchase or mortgage, where the title deeds always are, or ought to be, taken in: for if he has the creation and the assign ment of the term in his own hands, no use can be made of it against him. Such instances as these may account for the practice in many cases, but cannot constitute a general rule.

Much was said under the head of inconvenience, danger to marriage settlements, and to prior purchases fairly make. But the inconvenience which would arise on the other had, of breaking in upon the rule, That a purchaser for a valuable consideration, without notice, shall not be hurt in equity, or the a court of equity shall never take away the benefit of the la from him will balance all those arguments, and be found to outweigh them. This rule in equity bears an analogy and coformity to several rules of the common law relating to collsteral warranties, non-claims, and descents cast, which are only the wise inventions and decisions of the law to protect

and quiet possessions.

From this reasoning, I am clearly of opinion, upon the first point, that the defendant Cripps, the puisne mortgagee, would have been entitled in a court of equity to the benefit of this trust term to protect his mortgage, both against the marriage settlement and the plaintiff Jane's first mortgage, in case be had no notice of either.

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I may seem to stand in need of some excuse for being so ong upon this head, since at last my decree in this cause will. turn upon it, but merely upon the second point. But it and been so much laboured at the bar, and appeared in itself o be of so great importance to titles, that I thought it necessary that my opinion upon it at least should be known, and Loudney. hat the Court, by their silence, might not be understood to puntenance this new distinction, which had been set up.

Wile LOUGHBY ag ain**et** 

The second question is a particular one, and arises upon the special circumstances of this case: whether the defendant Cripps having full notice of the marriage settlement, the jointure, and the portions, and consequently not being entitled to the entire absolute benefit of the legal estate of the old term, can be preferred to the plaintiff Mrs. Willoughby, even as to her mortgage, or must come in only according to his priority in order of time. Upon this point I am of opinion that he must come in only according to his priority in order of time. My reasons are two.

First, he has not the legal estate of the term in himself; nor has he, as this case is circumstanced, the best or preferable right to call for that legal estate. Secondly, I cannot say that he took his mortgage clearly bona fide in this case.

Consider how the right would have stood as between the plaintiff Mrs. Willoughby's mortgage and the defendant Cripps's mortgage, in case there had been no assignment of the old term to a new trustee for Cripps, but the legal estate had remanined in Skylling, the surviving trustee in the first assignment, to attend the inheritance. In that case it would have been most plain that Mrs. Willoughby's mortgage should have. been preferred. Wherever the legal estate is standing out, either in a prior incumbrancer, or in such a trustee as against whom the puisne incumbrancer has not the best right to call for the legal estate, the whole title and consideration is in equity, and then the general maxim must take place, qui prior est sempore potior est jure. And this is the last point expressly determined by Sir Joseph Jekyll in the case of Brace and the Duchess of Marlborough, 2 P. Wms. 495. His words are, " In this case it appears that a puisne incumbrancer bought " in a prior mortgage, in order to unite the same to the puisne "incumbrance; but it being proved that there was a mort-" gage prior to that, the Court clearly held that the puisne "incumbrancer, where he had not gotten a legal estate, or "where the legal estate was vested in a trustee, could Vol. I. Ggggg

1787. WIL-LOUGHBY rainst

"then make no advantage of his mortgage, but in all eases " where the legal estate is standing out the several incumbrances " must be paid according to their priority." Those words, " in all cases where the legal estate is standing out," must be understood subject to my Lord Cowper's qualification and disloveney, tinction, so standing out as that the puisne incumbrancer has not acquired the better or preferable right to call for that legal estate. Now this he has plainly not done here for the defendant Cripps having full notice of the marriage settlement before he took his mortgage, the plaintiff Mrs. Willoughby, has the better and preferable right, even as against the defendant Alexander Boote, the new trustee, to call for the legal estate of the old term to protect her jointure. She might upon equitable grounds, demand it to be assigned to a new trustee for her; and when that was done, I think she might protect her mortgage by it. This brings the whole to be an equity, and subjects the case to the rule, qui prior est tempore potior est jure. She might come for an injunction to restrain Boote from recovering the possession from her by ejectment, and compel the defendant Cripps to redeem her in respect of the arrears of her annuity, and then he must redeem her entirely. not so strong as the case of tacking a third incumbrance to a first, in order to squeeze out a second, because it goes only in support and preservation of the plaintiff's actual priority, her original, prior, equitable right, which she acquired by having the first mortgage.

But I think this point is materially corroborated against the defendant by my second reason, which is, that he did not take his mortgage clearly bona fide in this case. It appears plainly to me that he aimed at gaining an unfair advantage in the manner of taking his security. He had full notice of the marriage settlement, the jointure of 350L per annum, and the younger children's portions. He knew all these to be prior incumbrances on the estate, and yet in contradiction to this, and with his eyes open, he took an express covenant in his mortgage deed, that the premises were free from all incumbrances, except one indenture of assignment of the whole term to the defendant Boote, and the said term and the mesne assign. ments thereof in the said last assignment mentioned. This was plainly intended to conceal that full notice which he had of the marriage settlement; and in consequence thereof he has not admitted that notice by his answer in this cause, but has put the plaintiff upon the proof of it; and now it comes out by the proofs, in this strong light, that it appears to have been fully fully stated in the case laid before his own counsel previous to the lending of his money. This is against conscience, and

is a badge of an indirect and collusive intention.

For these reasons I am of opinion that the defendant Cripps wants, and stands devested of, two ingredients necessary to entitle himself in equity to the protection of this whole term LOUGHEY. against the plaintiff, that is to say, a clear bona fides, and the first and best right to call for the legal estate, and therefore that he can come in only according to the order of time, which is posterior to the jointure, the portions, and the plaintiff's mortgage.

Decreed; The proper accounts to be taken of principal and interest; a sale of the estate; and application of the money arising by the sale; and the mortgage to the plaintiff the widow to be preferred to the mortgage to the defendant Cripps,

according to it's priority in time.

The KING against The Inhabitants of MARGAM.

1787. WIL LOUGHBY against Ŵ1L-

Wednesday, May 16th.

An order of THE paupers, John Thomas and Barbara his wife, were removal. removed from Langunwd to Margam, both in Glamor-adjudging ganshire, by an order of two justices, in which they adjudged that the that the paupers were last legally settled in the parish of Mar-pauper was gam by virtue of a certificate, bearing date the 1st of May 1741, A. by virtue under the hands and seals of L. Ruff churchwarden, and H. of a certifi-Thomas overseer of Margam, and A. Powell and S. Williams cate, was justices of the peace, and attested by two witnesses. The pa-at the sesrish of Margam appealed to the next sessions at Glamorgan, sions on the where the order was affirmed on hearing the merits. These merits; on orders being removed here by certiorari, this court in Hilary its being stated by the 1786, directed the sessions to state the number of overseers sessions that and churchwardens of Margam at the time of granting the the certificertificate. In answer to this rule the court of sessions repre- cate was sented to the court of King's Bench that they could not state by a majothe same without proceeding to examine witnesses on both rity of the sides, which they did not conceive themselves authorized to churchwardo, without the further directions of the court of King's Bench. dens and overseers of In Hilary 1787, the court of King's Bench ordered the court A, this court of sessions to examine into and certify the number of church-quashed the wardens and overseers of the poor at the time of giving the orders. certificate in 1741; and to examine and hear such evidence ordered the as should be produced by the parties to those facts; to this sessions to rule the justices returned, that at the time of giving the certi-enquire into ficate there were two overseers and four churchwardens in a fact which appeared Margam.

doubtful on A rule the original order of re-

moval, even though the sessions stated no case for the opinion of the Court.

A rule having been obtained to shew cause why the order of sessions should not be quashed.

The Kano

Plumer shewed cause. Although the certificate granted by The lobabifrom the ircumstances of its not having been signed by a ma-MARGAM, jority of the churchwardens and overseers, was the only evidence before the justices who made the original order of removal. vet it does not follow that the sessions did not hear any other evidence on which their decision was founded. And as it appears by the case that the court of sessions confirmed the order on hearing the merits, it must now be presumed that they heard other evidence with respect to the settlement of the paupers in Margam. But if that presumption cannot be made, the Court will send the case down to the sessions, in order that it may be stated, whether or not they decided solely on the certificate itself. But at all events, if this coust should feel themselves bound to quash the order of sessions, it may be done, without prejudice to any future order of removal, as this is an objection to the form, and not to the substance, of the order. Otherwise it will be doing manifest iniustice to the parish of Langunwa, since this order, if quashed generally, will be for ever conclusive as to them.

Lane, contra, was stopped by the Court.

ASHHURST, J. As it is extremely clear that the court of sessions have no power to make an original order of removal. this question must depend on the validity of the order of the two justices; if that be bad in substance, the court of sessions cannot amend it; for that would be to make a new order. Now the original order adjudges, that the paupers were last legally settled at Margan by virtue of a certificate, which was signed by only one churchwarden and one overseer: it appears on enquire that at the time of granting the certificate there were four churchwardens and two overseers in Margan, so that in fact it was not signed by a majority of them as the statute directs; the certificate therefore is an absolute nullity. Then the order of justices was confirmed by the court of sessions without any adjudication that Margan was the last legal place of settlement of the paupers. But even supposing that the sessions did in fact hear any other evidence than that which respected the certificate, and founded their decision upon such evidence, that would be to make an original order of removal; but they were not warranted in enquiring into any other question than this, whether thë

he order of the two justices was good or not. As to the con. 1787. منها sequences of quashing this order generally, we cannot depart rom the common rule, and add that it shall not prejudice any The King uture order of removal.

(a) GROSE, J. When this case first came before the court, thants of the only doubt was, whether the certificate was signed by a MARGAN. majority of the church wardens, and overseers of Margam; it now appears by the re-statement of the case that there were four church wardens and two overseers in Margam at the time when this certificate was granted; therefore as it was signed by only one churchwarden and one overseer it is undoubtedly bad. In the original order of removal, it was adjudged that the paupers were last legally settled at Margam by virtue of the certificate. Then the question is, whether that order is right? but it cannot be supported since the certificate which was the foundation of it is void. If the certificate had been good, it would have been conclusive evidence of the settlement at Margam. The certificate not being good on account of it's not being signed by a majority of the church wardens and overseers, the paupers may have gained a subsequent settlement in any other place; and the enquiry before the order of removal should have been, whether they had gained any other settlement, or whether they were settled at Margam by any other means. But this adjudication is that they were settled at Margam by virtue of the certificate, and therefore the order of sessions which confirmed the original order must be quashed. As to the question, whether or not this order will be conclusive against the parish removing? it may be doubtful: at present I give no opinion about it. The order does not say generally that the paupers were last legally settled at Margam; but only that they were settled there by virtue of the certificate. But if the order be conclusive against them, it is the consequence of their own negligence in not taking care that the certificate was properly signed. However, in all probability the paupers have gained a subsequent settlement in some other place where they may have resided under the idea of the certificate being good.

Rule absolute.

<sup>. (</sup>a) Mr. Justice Buller was sitting the whole of this day at Guildball.

1787.

Wednesday May 16th.

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The KING against The Inhabitants of SULGRAVE.

N a rule to shew cause why an order of sessions should not If a servant be hired and be quashed, it appeared that the pauper had been re-November to moved from Chipping warden to Sulgrave, and that the justi-Michaelmas ces at the sessions had confirmed the order, subject to the opi-

nion of this Court on the following case.

The pauper, subsequent to his gaining a settlement at Sul-Micbaelmae grave, was hired the latter end of November 1785, to Jonas master offer Welsh of Wormleighton till Michaelmas then next, at 6L 10s. to hire him from Mich. Two or three days before Michaelmas the master ofaelmae for a fered him the like sum for the year ensuing, which the pauper year at cer- did not think sufficient. On Michaelmas day the master oftain wages, fered him seven guineas, and they had agreed for wages all to which he but the expence of washing. The servant had no intention of leaving his master, and he believed his master had no inremains in tention of parting with him. He continued in his master's house, and did what was to be done as usual, but without any cond day af obligation; lodged at his master's house, and did not remove ter Michael-any of his clothes, or offer himself to any other master, nor did mas, work his master seek after another servant. He thought himself at ing as usual, liberty to have left his master if any better hiring had offered. expressible of He did not agree with his master on this day; but the day next but one, being the second day after Michaelmas, the pauserves a part per agreed to accept the seven guineas as before offered him for of the year; the year ensuing.

He did not expect that his wages were to be due on the follaster hiring lowing Michaelmas, but at the expiration of the year from the day he agreed with his master to accept the seven guineas; and he continued in the service till the Whitsuntide following.

Gally in support of the order of sessions, contended that the two services at Wormleighton could not be coupled because there was a chasm for a day. This question depends upon the construction of the 8 & 9 W. 3. c. 30. which, being an explanavice, so as to tory statute, cannot be extended beyond the words of it. Although it has been determined that a servant may gain a settlement by hiring and service under that statute if he continue in the same service during a year, though it be not performed under the same hiring, yet the Court has always been strict in requiring a continuation of the same service. And if there be an interruption between two services even for an instant, they cannot

cannot be joined for the purpose of giving the servant a settlement. In the case of the King v. Fifehead (a), where the pauper, after quitting his master's service, returned on The King the same day and entered into a new contract, it was holden to against Sulgrave. be no discontinuance of the service, because there can be no fraction of a day. But in Wishford v. Bretford (b), where the servant returned to his master the day after he had left his service and made a new agreement, it was determined that the pauper did not gain a settlement, because there was an interruption between the two services. It appears, therefore, that the party must be in the capacity of an hired servant during the whole period of a year. Now it is stated in this case that on Michaelmas day the pauper did not agree with his master, but the next day but one afterwards he did; so that he was not in the capacity of an hired servant the day after Michael-And though he continued to work for his master during that interval, yet the service of that time was not of such a nature as could be joined with the preceding and subsequent ones; for the pauper served that time without any obligation; and hirings, which are not ejusdem generis, cannot be coupled (c). The agreement on the Michaelmas day cannot be considered to be conditional in the first instance, so as to become absolute by a reference from the time when the contract was completed; because it is expressly stated that they did not agree at that time. As to the pauper's having no intention of leaving his master, it has been repeatedly determined that the apprehension of the pauper is perfectly immaterial (d).

Dayrell, contra, insisted that all the requisites of the statute were complied with, because there was a hiring for a year and a service for a year. It cannot be said that there was any discontinuance of the services, because the case states that the pauper did not depart from his master's service: He not only continued in the service, but he had no intention of leaving it, neither had the master any intention of turning him away. The pauper did not cease to continue in his master's service, because the contract was not completed till the second day after Michaelmas, since it is stated that he was in actual service and worked during that interval. And supposing no new contract at all had been made, the servant might have maintained an action against the master for his service on a quantum meruit. All those cases where the services have not been coupleed, have turned on a discontinuance of the service. In the King v. Fifehead there really was an absence,

<sup>(</sup>a) Burr. S. C. 116, Bott. 293- (b) Bott. 270. (c) Burr. S. C. 280. (d) Caldeck. 81.-

1787. sence, for the servant went away; and even there the Court held it was no discontinuance. And as to the case of WiekThe King ford v. Bretford, there was clearly a discontinuance, for the against Sulgrave, servant went away and actually left the master's service.

ASHHURST, J. I think this was a good service in Wormleighton according to the authority of all the cases cited. All that the statutes require, is that there shall be a hiring for a year, and a continuance in the same service for a year. Now the case states that in November 1785 the pauper was hired to serve till the Michaelmas following; that two or three days before Michaelmas the master offered him the same wages for the next year; that on Michaelmas day he offered him seven guineas, and that on the second day after Michaelmas the payper agreed to accept the seven guineas which had been before offered! It is further stated that the pauper had no intention of leaving his master, and that he did all his master's work as usual. And though he thought himself at liberty to leave his master's service on the Michaelmas day, and that when he agreed with his master the second day after Michaelmas, he considered that the year was to be computed from that day, yet there was a good hiring and service for a year. If so, the only question is, whether there was any discontinuance? It appears from the case that there was not; for the servant continued in the same capacity; he did his work as usual : and if he had continued to serve for half a year without entering into any new contract, he would have been entitled to a compensetion for such service; the law would have implied that he continued under the former agreement, and would have measured his damages by his former wages. Then he must be taken to have been in the capacity of a hired servant during that time. This is like the case of the King v. Croscombe (a): There the pauper was hired to Doctor Lucy, who lived in St. Andrew's. for a year, and he continued with his master a quarter of a year longer without coming to any new agreement, when he removed with his master into the parish of St. Cuthbert, where he continued six months. There was a sufficient continuation in the same service so as to give the servant a settlement in St. Cuthbert. In that case the servant was as much at liberty to quit his master's service after the first year, as the pauper in this case was on the Michaelmas day, and it might as well have been said that in that case there was not a continuance of the same service: But there the pauper gained a settlement

(a) Burr. S. C. 256.

by his service in St. Cuthbert. The cases, which were cited. so mot apply; for one was determined on the ground of there being no fraction of a day; and in the other there was a total The Kint discontinuance of the service; and though the service was only Sulgarian discontinued for a day, it could not be coupled with the subsequent one so as to give the pauper a settlement.

GROSE, J. I agree with the counsel, who argued against the rule, that two services cannot be joined if there be a chasm between them, or if they be not ejusdem generis: But in the present case there was no chasm and the services were ejusdem generis. First, as to the supposed interruption: It is stated that the pauper was hired from November till the Michaelmas following, and that on the Michaelmae day his master offered him seven guineas for the next year, which he did not agree to accept till the second day after Michaelmas: But I think that the moment he agreed to take the seven guineas he consented that the year should commence from the Michaelmas day when the offer was first made. Then as to coupling the services: It was determined soon after the passing of the statute of 8 & 9 W. 3. c. 30. in the case of the King v. the inhabitants of South Moulton (a), that a ser. vice for half a year under a hiring for a year might be joined with a service for another half year under a hiring for half a year, because they were ejusdem generis: So here the first hiring and service from November till the Michaelmas following may be coupled with the subsequent one, as they are both of the same nature.

Rule absolute.

(a) 1 Lord Raym. 426.

## FOSTER against TAYLOR.

Saturday. May 19th.

LBT on bond; pleas, non est factum; solvit post diem; In debt on bond, the

Balguy had obtained a rule to shew cause why the venue the applicashould not be changed from London to Lincoln, on the ground tion of the that the plaintiff's and the defendant's witnesses lived in Lin-defendant colnahire.

Wood shewed cause; and observed, that it was the invariable the place practice of the Court not to change the venue in these actions, where his unless some special ground were laid: and that a sugges-defence ariunless some special ground were laid, and the rever been witnesses lived in the country had never been witnesses deemed a sufficient reason to form an exception to the gene-reside. ral rule. From the nature of the defence to this action, there Hhhhh Vol. I.

will change

1787. FOSTER. against TAYLOR.

could not be many witnesses. And at all events this appl tion was made too late, issue being joined, and the c standi. e in the paper for trial at the sittings after term.

On the defendant's undertaking to give judgment at

Trinity Term, and not to bring a writ of error,

The Court said, that when a serious defence was inten to be made, it was reasonable to grant such an application similar grounds.

Rule absolute (a)

(a) Beavis administratrix v. Moore, Tr. 21 G. 3. B. R. Debt on an index Pleas, non est factum, and a set-off; Such an application was refused. In v. Hurrabin, M. 22 G. 3. B. R. Debt on bond. A motion was made to ch the venue into Lancusbire, on the ground that the defence arose in Lancus with an offer to admit the execution of the bond; but the Court refused to the rule. So in Flecke v. Gottfrey, E. 23 G. 3. B. R. which was a special a upon the case for running down the plaintift's ship, Low moved to change verue from Yorksbire, to Suffolk, alleging that the defendant's witnesses les Suffolk. It was answered on shewing cause that the plaintiff's witnesses im Yorksbire. And Lord Manefield said, that the venue in such actions could a changed unless some special ground were laid; that the reason alleged was sufficient, for that though it might be convenient to the defendant to try the com in Suffolk, it was equally convenient to the plaintiff to try it in Yorkabore, and the he had a right to lay the venue there; and the rule was discharged.

Monday, Ma, 21st.

A bill of

### GREEN against RENNET.

Mindlesex. filed of record as of when it ought to have been the 25 h may be amended

18.

IBBS had obtained a rule to shew cause why the bill d GIBBS nad obtained a rule to show the sath year of the Middlesex (a), which was filed as in the sath year of the reign of the present king, should not be taken off the record the 24 G. 3, to be amended according to the truth of the fact, and record ed again as of Hilary Term 25th Geo. 3.

Bearcroft shewed cause; and insisted that the Court could not amend in this instance; it appearing upon the rule lud that the bill of Middlesex, to amend which was the object of the present application, was a matter of record. In the case agreeably to of Robinson v. Raley (b), where, after a verdict found on some Vid. 6 Mod, issues and a demurrer argued as to others, an application was made by the defendant to withdraw the demurrers and plead Dennison, J. said, " The Court cannot help seeing that this Therefore we cannot help this: I wish we " is upon resord. " could, because the merits seem to be with the defendant." BULLER,

(a) Ante, 666.

(b) 1 Burr, 316.

GREEN against

RENNET.

BULLER, J. In Robinson and Raley, the application was to imend the pleadings, which was the act of the parties. But the reasoning of that case does not apply to the present; for this was a mistake of the defendant, and the motion is only to amend that mistake according to the truth of the case. And pesides, in this case there is something to amend by, namely, the precipe; which is a circumstance by which the Court have always been guided. There is a distinction between amending those mistakes, which are occasioned by the act of the party, and those which are occasioned by the act of the elerk. As in the case of executors, if the clerk enter judgment de bonis propriis instead of de bonis testatoris, and error is brought, this Court will order the entry to be amended even if the record be sent back from the Exchequer Chamber. Here we see that this is a mere mistake of the attorney, the present defendant.

GROSE, J. In the court of Common Pleas, fines and recoveries are amended every day upon the principle that there is

something to amend by.

Rule absolute.

### PARKER against WELLS in Error.

UPON a writ of error from the judgment (a) of the Court 15th May of King's Bench, the following questions were put to the 1787.

Judges by order of the House of Lords.

First, Whether the finding on this verdict be sufficient

whereupon to give final judgment?

Secondly, If the finding be insufficient, what award ought

to be made on such finding?

Thirdly, If the finding be sufficient, whether upon such finding the plaintiff in error appears to be a trader within the true intent and meaning of the statutes concerning bankrupts?

The Lord Chief Baron Eyre delivered the unanimous opinion of the Judges present upon the first question in the negative; and upon the second question that a writ of venire facias de novo ought to be awarded; whereupon it was adjudged accordingly that the Court of King's Bench do award a venire facios de novo.

(a) Ante, 40.

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1787.

### SUTTON against JOHNSTONE in Error.

22d Mayr 1787. Dom. Proc. THIS cause (a) being removed into the House of Lords; this question was put to the Judges, by order of their Lordships, What judgment or other award ought to be made upon the record as it now lies before the House?

Mr. Justice Gould delivered the unanimous opinion of the Judges present, that the judgment given in the Exchequer Chamber ought to be affirmed; whereupon it was ad-

judged accordingly.

(a) Aute, 550.

Lord Mansfield, Chief Justice, was unable to attend during the whole of this Term.

END OF BASTER TERM,

## INDEX

TO THE

# PRINCIPAL MATTERS,

### IN THE FIRST VOLUME.

۸.

ABANDONMENT.

WNERS of ships are not entitled to abandon, unless at some period of the voyage there has been a total loss. And where the jury have found only an average loss, occasioned by the perils of the sea, the court are precluded from saying there has been a total loss. Cagalet and others v. St. Barbe. Page 187

2. If the ship arrive safe, the circumstance of her not being worth repairing will not make it a total loss. ib.

3. The insurance is upon the ship for the coyage. If either the ship or the voyage, be lost, that is a total loss. ib.

4. Where an act of barratry has been committed during the voyage, as by amuggling, which subjects the vesseliume; Query, How far the assured may abandon? Lockyer and Others v. Offley.

5. On a wagering policy the assured cannot abandon. Kulen Kemb v.

6. When the assured receive intelligence of such a loss as entitles them to abandon, they must make their election in the first instance; and if they abandon, they must give the underwriers notice in a reasonable time; otherwise they wave their right to abandon, and can only recover as for an average loss. Mitchell and Others v. Edie. 698

7. Where the voyage is lost, but the property is saved, the owners may abandon.

See Barratry. Insurance. Rancom-Bill.

ABATEMENT.

1. The four days allowed for pleading-

in abatement are both inclusive Jennings v. Webb. Page 277
2. Every plea in abatement must be pleaded before the rule for pleading is out, and cannot be pleaded after an imparlance; unless the declaration is delivered so late in term that the defendant is not bound to plead to it in that term, or is delivered after term; in both which cases the defendant may within the first four days, inclusive of the subsequent term, plead any plea

Sunday is one. 278
3. The plaintiff may sign judgment if the defendant plead in abatement after the four days, though no rule to plead has been regularly served.

Remados v. Fame. 689

in abatement as of the preceding term,

whether a rule be given or not, and

ABSENCE.

See Settlement by biring and service, 1,2.

ACCEPTANCE.

ACCOUNT STATED. See Infant, 1, 2.

ACTION on the Case.

1. Possession alone for above 60 years of a pew in a church is not a sufficient title to maintain an action upon the case, even against a wrong doer, for disturbance in the enjoyment of it; hat

but the plaintiff must prove a prescriptive right, or a faculty, and should claim it in his declaration as appurtenant to a messuage in the parish Stocks v. Booth. Page 428

2. An action on the case will not lie for a malicious prosecution before a naval court martial, for an offence cognizable therein. Fobnatone v. Sutton, in Error, Excb. 493

3. An action for a malicious prosecution will not lie, if probable cause ap-

pear in the proceedings.

4 Malice, and the want of probable cause, are both necessary to support an action for a malicious prosecution. ib.
3. An action on the case for delaying to bring an officer under arrest to a payar court marrial will not lie, it because the support of the case of the cause of the case of the ca

to bring an officer under arrest to a naval court martial will not lie; it being a military offence, and the defendant not having been tried for it. 493, 548

6. Action on the case lies for maliciously obtaining or executing a warrant to search a house for smuggled goods, where none such are found. Gooper and Another v. Boot, in Error. 535.
7. Action on the case lies against a governor for maliciously suspending de

fendant from a civil office. Suther land w. Murray.

ACTS of Parliament. See Statutes. Trade, 5.

#### ADMINISTRATOR.

1. Where the detendant bound himself as administrator to abide by an award to be made touching matters in dispute between his intestate and another, and the arbitrators awarded that he, as administrator, should pay &c. he cannot plead plene administratit to debt on the bond; for by submitting to the award he has admitted assets.

Barry V. Rueb.

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See Executor.

### ADMISSION.

See Copybold. Survenier.

### AFFIDAVIT.

1. To hold to bail must in general be positive. Sheldon v. Baker. 83

2. The cases of assignees, executors, &c. are exceptions to that rule; and they must swear as to their belief of the debt.

3. An affidavit to hold to bail on the lottery act, 27 Geo. 3. c. 1. should spe-

cify the nature of the offence, and aver that the defendant has incurred the forfeiture: but the offence need not be described circumstantially t nor is the plaintiff obliged to swear that the defendant is indebted to him to the amount of the penalty. Doois v. Mazzinghi. Page 705

4 An affidavit to hold to bail, " stating a promise made by the defendant executor, &c. to pay a legacy of 1004. bequeathed by his testatrix, and confessing assets to the amount of 2804 but that the plaintiff, not receiving the said sum, caused several applications to be made to the defendant without effect, therefore that the defendant was indebted, &c." is not sufficiently positive. Mackensie v. Mackensie.

5. In one instance the court held an aftidavit, "that the defendant was indebted to the plaintiff in 50001. formoney had and received, and for which he had not accounted," to be sufficient.

See Jury. Practice, 7.

### AGENT.

An officer appointed by government, treating as an agent for the public, is not liable to be sued upon contracts made by him in that capacity. Macbeath v. Haldimand.

2. Not even though he contract by deed, if it be on account of government.

Unwin v. Walseley.

674

3. A plaintiff is bound by the acts of his attorney's agent in town. Griffiths v. Williams. 710
See Insurance, 21, 22.

#### AGREEMENT.

1. An agreement in writing to put in good bail for a person arrested on mesne process, at the return of the writ, or surrender the body, or pay debt and costs, made by a third person with the bailift of the sheriff, in consideration of his discharging the party arrested, is void by 23 H. 6, e. 10. Rogers v. Reeves.

2. But the undertaking of an attorney for the appearance of a defendant is not within the statute, because it is given to the plaintiff in the action, and not to the sheriff.

3. Where a lease came into the hands of the original lessor by an agreement entered into between him and the as-

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SIGNOC

signee of the original lessee, of that ! " the lessor should have the premises as mentioned in the lease, and " and above the rent annually, to-" wards the good-will already paid " by such assignee;" such agreement operates as a surrender of the whole term. Smith v. Mapleback. Page 441 4. The sum in such an agreement is considered as a sum to be paid annually in gross, not as rent : and the assignee cannot distrain either for that, or for the original rent, but he has a remedy by assumpsit for the sum reserved for the good will. See Contract. Sheriff. Ejectment, 8.

### ALLOWANCE.

See Pauper, 1.

### AMENDMENT.

 A bill of Middlesex, filed of record as of the 24 Geo. 3. when it ought to have been of the 25th, may be amended agreeable to the truth. Green v. Rennet.

 The principal circumstance the court look to in such cases is to see whether there is any document to amend by. ib. 783

3. Such mistakes as are made by the clerk in court may be amended; but those in the pleadings being made by the party himself cannot. 783

4. In the case of executors, if the clerk enter judgment de bonis propriis, instead of de bonis testatoris, and error is brought, this court will order the entry to be amended, even if the resord is sent back from the exchequer chamber,

### ANNUITY.

1. An action for use and occupation may be maintained by a grantee of an annuity after a recovery in ejectment, against a tenant who was in possession under a demise from year to year, for all rent in his hands at the time of notice by the grantes, and down to the day of the demise in the ejectment; but not afterwards. Birch v. Wright.

2. The consideration of an annuity being partly a debt antecedently due for goods sold, and the residue thereof money paid at the time of granting it, the grantee may recover back in an action for money had and received the

wignes of the original lesses, of that the lessor should have the premises as mentioned in the lease, and should pay a particular sum over and above the rent annually, toof wards the good-will already paid by such assignee;" such agreement operates as a surrender of the whole see Scive Facies, 1.

### APPEAL.

1. Notice of an appeal against a poor's rate must be given to the church-wardens or overseers of the parish making the rate by the 17 Geo. 2. c. 38. The King v. the Churchwardene U.c. of Maskern.

 But it is not necessary for the appellant to give notice to the person whose name is omitted in the rate.

See Quarter Sessions. Witness, 6.

APPEARANCE. See Practice, 12. Attorney, 2.

APPOINTMENT.

See Power.

APPRENTICE.
See Settlement by Apprenticeable.

APPURTENANT. See Pou, 1. 2.

#### ARREST.

1. One who is convicted of a penalty under the lottery act, cannot be apprehended on a Sunday for non-payment of the forfeiture; it not being a constructive breach of the peace, though the defendant might have been indicted in a criminal manner on the act, in which case he might have been arrested on a Sunday The King v. Myers.

So an attachment for non-performance of an award is only in the nature of a civil execution. ib. 266
 So an attachment for non-payment of costs. ib.

See Baron and Feme, 9,

ARTICLES of the Peace.

1. Upon articles of the peace exhibited, the court have the power of requiring bail for such a length of time as they shall think necessary for the preservation of the peace, and are not confined to a twelvemonth. The King v. A. R. Boxes. 696

2. And where the court had at first required bail for 14 years, they afterwards lessened the time to two years, upon its appearing to them that an information was defending against the gefendant on the same account which must necessarily be determined within that time.

Page 696.

ASSAULT and BATTERY, See Costs, 20.

ASSETS.

Bee Executor, 2, 3.

ASSIGNEES of Bankrupt. See Bankrupt, ussignees of.

#### ASSUMPSIT.

- 1. Where two parishes had been a long time united and had had a joint sexton, who was paid by both, and afterwards one of them claimed a right of electing a separate sexton, of which they had given notice to the other, that other parish cannot maintain an action for money paid, laid out, and expended, to the use of the first parish for their quota of the sexton's salary. Stokes and Others v. Lewis and Another.
- 2. Neither can the right of the sexton be tried in such case without his being a party to it. ib. 22
- S. Neither is the payment of the salary a joint obligation on the two parishes, for the sexton in such case cannot bring his action against one of the parishes for the whole sum. ib.
- 4. Assumpsit for money paid, laid out, and expended, will not lie, when the money has been paid against the express consent of the party, for whose use it is supposed to have been paid.
- 5. If A. be indebted to B. and pay such debt to the attorney of a person suing A. in B.'s name, but without his authority. B may notwithstanding recover in an action for money had and received against A. whose remedy is against the attorney who trusted to the counterfested warrand attorney as from B. although he conceived that he was acting under a real authority. Robson v. Eaton.
- 6. Assumpsit for money had and re reived lies when a payment has been made on a contract which is

put an endeto. Towers v. Barcott.
Pare 183

7. But if it continue open, the plaintiff can only recover damages for the breach of it; and then he must state the special contract.

- B. The difference between those cases where the contract is open, and where it is not so, is this: If the contract be reacinded, as where by the terms of it, it is left in the plaintiff's power to reacind it by any act, and he does it; or where the defendant afterwards assents to its being rescinded; the plaintiff is entitled to recover back his whole money; and then an action for money had and received will lie. But if the contract be open, the plaintiff's demand is not for the whole sum, but for damages arising out of it; and then he must state the special contract.
- 9. In an inferior court the declaration must allege that the money was bad and received within the jurisdiction, as well as that the defendant promised to pay within it. Trevor v. Wall.
- 10. Where a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought to pay, be cannot recover it back again in an action for money had and received.

  Bize v. Dickason. 286
- 11. Neither can he recover back a sum paid for a debt which would otherwise have been burred by the statute of limitations, or a debt contracted during his infancy.
- 12. But where money has been paid under a mistake, which there was no ground in conscience to claim the party may recover it back again in an action for money had and received to his use.
- 13 Assumpsit for money had and received lies against an overseer of the poor to recover money in his hands, which had been levied on a conviction which was afterwards quashed. Felt. ban v. 2erry, E. 13 Geo. 3. cited in Birch v. Wright.
- 14. Money had and received does not lie by the nominee of a perpetual curacy for the profits thereof, till be has had the bishop's licence. Possell v. Milbank, M. 12 Geo. 3. B. R.

15, But

15. But it does lie by the nominee of a ! donative before the bishop's licence. against a person who receives the rents and profits. The King v. Biabop of Chester. Page 403

16. But where a donative had been twice augmented, it should seem the nominee cannot maintain such action without the bishop's licence.

- 17. An agreement between the lessor, and the assignee of the original lessee, "that the lessor should have the premises as mentioned in the lease, and should pay a particular sum over and above the rent annually towards the good-will already paid by such assignee," operates as a surrender of the whole term; and the sum reserved for good-will is to be paid annually in gross, and not us rent: and the assignee cannot distrain either for that, or for the original rent, but he has a remedy by assumpsit for the sum reserved for the good-will. Smith v Mapleback.
- 18. A general indebitatus assumpsit will lie for tolls, Seward v. Baker.
- 19. If the plaintiff reply to a plea of infancy, that the defendant after he attained 21, confirmed the promise, and the defendant rejoin that he did not, the plaintiff need only prove a promise, and the defendant must shew he was under age at the time. Borthwick v. Carruthers.

See Armity, 1, 2, 3. Bill of Exchange, 9, 10. Infant, 1, 2, 4. Lease, 3.

#### ATTACHMENT.

1. An attachment for non-performance of an award is only in the nature of a civil execution, and a party cannot be arrested thereon on a Sunday. The King v. Myere. (1 Atk. 58, denied to be law.) 266

2. So in the case of an attachment for non-payment of costs, and there the party in custody is entitled to be discharged under the lord's act. Comp.

See Arrest. Rule.

#### ATTORNEY.

1. If A. be indebted to B. and pay such debt to the attorney of a person suing A. in B.'s name, but without his liged to pay B. again, who may recover it in an action for money had and received; and A.'s remedy is against the attorney who trusted to the counterfeited warrant of attorney from B. although he conceived that he was acting under the real authority of B. Robson v. Eaton. Page 62

The undertaking of the defendant's attorney, in order to procure his discharge, to put in bail or pay the debt is not within the 23 H. 6. c. 10, which avoids all undertakings made for a prisoner's discharge except bond taken by the sheriff for the prisoner's appearance, &c. because it is given to the plaintiff in the action, and not to the sheriff. Rogers v. Reeves.

ATTORNEY GENERAL. See Smuggling, 4.

### ATTORNMENT.

1. Statute of, its construction. 2. A tenant to a mortgugor, who does not give him notice of an ejectment. brought by the mortgagee to enforce an attornment, is not liable to the penalties of the 11 Geo. 2. c. 19. s. 12, for secreting ejectments. Buckley v. Buckley.

AUDITOR.

See Mandamue, 7.

AVERAGE LOSS. See Insurance, 12, 29, 30.

AVERMENT. See Pleading. Perjury, 3. 6.

AUGMENTATION. See Donative.

AWARD. See Attachment, 1. Executor, 3.

B.

BAIL.

N executor in his affidavit to hold to bail must swear as to bis belief of the debt. Sheldon v. Baker.

2. An affidavit to hold to bail on the lottery act, 27 Geo. 3. c. 1. should specify the nature of the offence, and aver that the defendant has incurred authority; A. is notwithstanding ob- the forfeiture: but the offence need not be described circumstantially: nor is the plaintiff obliged to swear to the amount of the penalty. Davis Page 705 v. Mazzingbi.

3. Upon articles of the peace being exhibited, the court may require bail for such a length of time as they shall

think necessary for the preservation of the peace, and are not confined to a twelvemonth. The King v. A. R. Bowes. 696

4. Where the court had at first required bail for fourteen years, they afterwards lessened the time to two years, on its appearing to them that an information was depending against the defendant on the same account, which must necessarily be determined within that time.

5. An affidavit to hold to bail, " stating a promise made by the defendant executor, &c. to pay a legacy of 100/. bequeathed by his testatrix, and confessing assets to the amount of 280%. but that the plaintiff, not receiving the said sum, caused several applications to be made to the defendant without effect, therefore that the defendant was indebted, &c." is not sufficiently positive. Mackenzie v. 716 Mackenzie.

See 8beriff. Witness, 4.

### BAIL in Error.

1. Must be put in within 4 days after final judgment signed, without reference to the time of the allowance or serving the copy of it. Jaques v.

2. As the bail in error cannot surrender the principal, they are not entitled to relief, though the principal become a bankrupt, pending the writ of error. Southcote v. Braithwaite.

### BAILIFF.

624

See Sheriff.

### BANKRUPT.

1. Where S. L. was arrested for the amount of goods, and E. L. in order to procure his discharge became bound, as surety with him, in a bond to the plaintiff, payable by installments, and before the first default E. L. became a bankrupt, the plaintiff is bound to prove his debt under the commission by vir-

was given to both. Brooker and Another v. Lloyd. Page 17 that the defendant is indebted to him 2. A person who rents a brick ground and makes bricks thereon for public sale, and buys sand and fuel, which are necessary ingredients for converting the earth and clay into bricks, is subject to the bankrupt laws. Welle v. Parker, in Error. 34 3. Renting a brick ground as a distinct occupation, is a mode of purchasing the clay. 4. It a man exercise a manufacture from the produce of his own land, as a necessary or usual mode of enjoying that produce, he shall not be considered as a trader, though be buy necessary ingredients to fit it for the market: but where the produce of the land is merely the raw material of a manufacture, and the manufacture not the necessary mode of enjoying the land, there he is a trader. ib. 38, 9

5. As in the case of a farmer, who makes cheese on his own land, and buys runnet and salt; he is not a tra-

6. So where a man makes his own apples into cyder.

7. Proprietors of allum works are no ib. traders. 8. Neither are the workers of coal

9. Whether bankruptcy is a plea to an action of covenant for rent. Ludford v. Barber.

In the case of the South-sea Company, the act, by which all their property was taken out of their hands and vested in trustees for the satisfaction of their creditors, was held no bar so an action of covenant. Hornby v. Houlditch.

11. Bankruptey is a good plea to an action of debt on the reddendum in a lease. Wudbum v. Marlowe.

12. If a bankrupt give a preference to a creditor under an apprehension, however groundless, of legal process, such preference is valid. Thompson and Others assignees of Wiseman v. Freeman.

13. A bankrupt is not entitled to any maintenance out of his effects during his examination. Thompson and Others assignees of Nelson v. Councell.

14. If any person during a bankrups's tue of 7 Geo. 1. c. 31. for the credit | examination take any thing out of 361

ib. 370

his effects and convert it into money, though for the necessary subsistence of the bankrupt and his family, the assignees may maintain trover agains: such person. Page 157

15. An execution against the goods of a bankrupt, taken out after his certificate is signed by the creditors, and before it is allowed by the Chancellor, is valid. Callen v. Meyrick.

16. The statute 5 Geo. 2. c. 30. only relates to the discharge of the person of the bankrupt, who is in custody on a judgment obtained before the allowance of the certificate.

17. A specific sum of money received by an overseer of the poor, is not such a debt as can be proved under a commission of bankrupt against him before his accounts are delivered in. The King v. Egging-369 ton.

18. If the money were kept apart from that bankrupt's general property, the assignees could not have claimed it.

19. The plaintiff, after judgment and a writ of error allowed, having become a bankrupt, his assignees cannot spe out a scire facias in their own names to compel an assignment of errors, till some judgment be given, and then it must be done immediately after such judgment. Kretchman v. Beyer, in Error. 20. An innkeeper, who sells liquor

out of the house to all customers applying for it, is subject to the bankrupt laws, however inconsiderable the extent of such dealing, and the profits arising from it, may be. Patman v. Vaugban.

21. So is a farmer who buys and sells horses with a view to make a profit by them, though the instances be Bartbolomew v. Sherwood. 573, n. a.

22. A surety who does not pay the debt of the principal till after his bankruptcy, though called upon and liable to pay it before, may hold the principal to bail, notwithstanding his certificate: for as the debt does not arise till the money is paid, it could not be proved under the commission. Paul. v. Jonce.

23. The assignor of a chose in action, who is become a bankrupt, may sue 1. A feme covert, living apart from

benefit of the assignee. Winch v. Page 619 24. A debt due to a bankrupt, as trus-

tee for another, does not pass under the assignment of his effects by his

commissioners. 25. A bond and warrant of attorney to confess a judgment given by a bankrupt after his bankruptcy, in

order to obtain his liberty, is not barred by his certificate, although the original debt were contracted before. Birch v. Sbarland.

26. The old debt was extinguished by such bond given for such purpose. ib. See Bail in Error, 2. Bills of Exchange,

Commission del credere, 3. BANKRUPT, Assignces of.

1. The plaintiff after judgment and a writ of error allowed, having become a bankrupt, his assignees cannot sue out a scire facias in their own names to compel an assignment of errors, till some judgment be given: and then it must be done immediately after such judgment. But they should go on with the writ of error in the bankrupt's name till judgment. Kretchman v. Beyer, in error. Assignees cannot make themselves

parties to the record in any intermediate stage of the proceedings, but it must be immediately after judgment; though an interlocutory judgment is sufficient for that purpose.

BANKRUPT, Commission of.

1. Trespass will not lie by the assignees of a bankrupt, against a sheriff for taking the bankrupt's goods in execution, after an act of bankruptcy, and before the issuing of the commission; notwithstanding he sells them after the issuing of the commission: and after a provisional assignment, and notice from the provisional assignee not to sell. Smith and Another assignees of Clarke v. 475 Milles.

Whether proof of a debt of 161/. to one of the petitioning creditors there being more than three, will support the commission of bankrupt. Qu.3

See Bille of Exchange.

### BARON and FEME.

the debtor in his own name for the her husband, and having a sepamie

11

be sued as a feme sole. Corbett v. Poelnitz et ux. Page 5

2. And she continues liable notwithstanding she aliens the whole again. ib. 10

3. In such case the husband is not liable even for necessaries. ib. 10

4. Where credit has been given to the wife of a man in exile, she alone is li-

5. So where the husband has abjured the realm ib. 8

6. So where he is transported. ib. 9

7. Where a married woman has a separate estate and acts and receives credit as a feme sole, she shall be liable as such.

8. A second husband is liable for debta contracted by his wife while she was living in a state of separation from her first husband, and had a separate maintenance.

9. A feme covert was discharged out of custody, because she was arrested without her husband; though the writ was sued out against both, on which non est inventus was returned as to the husband. Edwards v. Rourke et ux 486

#### BARRATRY.

1. Where an act of barratry has been committed during the voyage, as by smuggling, which subjects the vessel to forfeiture ; Quere, How far the assured may abandon? Kulen Kemp v. 104

Vigne. 304
2. Barratry can only be committed by the master or mariners against the owner of the ship, and without his con-Nutt v. Bourdieu. 323 sent.

3. The owner of the ship cannot commit barratry: He may make himself liable to the owner of the goods by his fraudulent conduct, but not as for barratry. 323

4. Therefore where any of the owners of the ship are concerned in the fraud of the master or mariners, it is no barratry in them, and the underwriter is not liable. ib.

See Abandonment. Insurance.

### BASTARDS.

1. Are within the meaning of the marriage act 26 Geo. 2. c. 33. which requires the consent of the father, guardian, or mother, to the marriage of perons under age, who are not married by banns. The King v. Hodnets

rate maintenance, may contract and 2. The rule that a bastard is mullius filius applies only to the case of inheritances. ib. Page 101 BEQUEST.

See Devise.

BILLS of Exchange, and Promissory Notes.

1. If the holder give time to the acceptor of a bill of exchange, or drawer of a promissory note, after it has been dishonoured, the indorser is discharge ed. Tindal and Others v. Brown. 167

2. Notice of a bill of exchange or promissory note being dishonoured must come from the holder.

3. What is reasonable notice to the indorser of non-payment by the drawer of a promissory note, or acceptor of a bill of exchange, is a question of law, arising from the particular facts.

4. Where the note became due on the 5th of October, and the indorsee's clerk called on the drawer Donaldson, at 10 o'clock in the morning, and not finding him at home, left word that the note was due, and desired that the drawer would send for it to his master's and take it up; and on the 6th called again on the drawer, who told him he would take it up that day within the banking hours, which not being done, the other called on the drawer again on the 7th, and not finding him at home then tendered it to the indorser; and all the parties hved within 20 minutes walk of each other; the indosser was discharged by the laches of the holder, notwitstanding he had notice from the drawer on the 6th, that he could not pay it.

5. In this case, even if the notice had been given on the 6th, it would have been too late, because the plaintiffs had given credit to the drawer. ib. 171

6. Where the drawer of a promissory note, or the acceptor of a bill of exchange, do not live in the same place, the holder must write by the next post after the bill is dishonoured.

7. Where a hill of exchange was drawn upon A. residing in London, by a consignor of goods living abroad; and on its being presented for acceptance, A. said, he could not then accept, because he did not know whether the ship would arrive at London or Bristol; on which B. the holder agreed to leave it for some time, reserving the liberty of protesting it for nen-acceptance, in

case A. did not accept. On a second ! application A. said, the bill would be paid even if the ship were lost : This is only a conditional acceptance, depending on two events; the ship's arriving at London, or being lost: And B. having the liberty of refusing such conditional acceptance, precludes himself from recovering against A. by afterwards noting the bill for non-accept-Sproat v. Matthews. Page 182 8. Whether a conditional or an absolute

acceptance, is a question of law. 9. Upon a request to A. to accept a bill, and to draw upon B, for the same sum, the mere act of drawing upon B. does not amount to an acceptance. Smith

v. Nissen.

10. And if after B.'s refusing to accept the bil! drawn on him by A., A. pays the bill drawn on him for the honor of the drawer, he may recover back the amount of it from the drawer in an action for money paid, laid out and expended. ib.

11. A. creditor of B. to the amount of 115/. took his bill for 20/ no C. who had not then, nor afterwards, any effects of B. in his hands: the bill, when due, was dishonoured, and no notice thereof was given by A. to B.: still A.'s demand was not discharged; but he may sue out a commission of bankrupt against B. and his debt will support it. Bickerdike and another assignees of Reichard v. Bollman. 405

12. Notice of a bill's being dishonoured by the drawee is not necessary to be given to the drawer, if he has no eflects in the hands of the drawee either at the time of drawing, or when the bill becomes due.

13. Where a payee of a bill of exchange indorses it to  $\Delta$ . and B. as executors, they may declare as such in an action against the acceptor. King and Others executors, &c. v. Thorn. 487

14. In an action against the acceptor of a bill of exchange, it is necessary to prove the hand writing of the first indorser; notwithstanding such indorsement was on the bill at the time it was accepted. Smith v. Chester.

15. An acceptor is only precluded from disputing the hand writing of the drawer, for which reason the acceptor is liable though the bill be forged.

16. If the indorsee of an inland bill, not

is refused, and delay giving notice to his indorser, the indorser will be discharged. Goodall v. Dolley. Page 712 17 And a subsequent proposal by the indorser to pay the bill by instalments. made without the knowledge of the indorsee's laches, is not a waiver of the want of notice. See Infant, 4. Witness, 7, 8.

Bills of Lading.

1. Where several bills of lading of different imports have been signed, no reference is to be had to the time when they were signed by the captain; but the person who first gets legal possession of one of them, by delivery from the owner or shipper, has a right to the consignment. Caldwell and Others v. Ball.

2. And where such bills of lading, though different upon the face of them, are constructively the same, and the captain has acteu bona fide, a delivery according to such legal title will discharge him from them all.

3. The indorsement and delivery of a bill of lading is prime fasie an immediate transfer of the legal interest in the cargo. 205, 215, and 216, and Hibbert v. Carter.

4. But if the intention of the parties appears to have been only to bind the nett proceeds in case of the arrival of the goods, then an insurance made on account of the indorser after such indorsement is good. Hibbert v. Carter.

Bill of Middlesex. See Practice, 2. Record, 1

Bishop's Licence. Bee Licence. Assumpsit, 14, 15, 16.

#### BOND.

1. The circumstance of 20 years having elapsed without any demand made, is of itself a presumption that a bond of itself a presumptum.

has been satisfied. Oswald v. Leigh.

270

2. Satisfaction of a bond may be presumed within a less period, if any evidence be given in aid of the presumption; as if an account between the parties has been settled in the intermediate time, without any notice having been taken of such a demand.

3. But in either case it is only a ground due, present it for acceptance, which on which the jury may presume sathefaction;

tisfaction; and is in itself no legal bar. Page 270

4. A bond with a condition, that a clerk shall faithfully serve and account for all money, &c. to the obligee and his executors, does not make the obligor liable for money received by the clerk in the service of the executors of the obligee who continue the business, and retain the clerk in the same employment, with the addition of other business, and an increase of salary. Barker v. Parker. 287

5. But a bond for the fidelity of a clerk, who was taken into the service of the obligees as a clerk in their shop and counting bouse, is not discharged by the obligees taking another partner into their house; and the obligees may recover money received by the clerk after such change of partners. Barcley v. Lucas. 291, n. a.

6. Such a bond is only as a security to

the bouse of the obligees. ib.
7. Under a bond of indemnity given by
A. that B. who was appointed the
general agent of C. the receiver of
his rents, and the manager of his estates, should pay over to C. all rents
which he should receive, as also the
increase and improvements thereof upon any new contracts or renewals af leases; A. is answerable for all fines received by B. on renewing the leases,
which were not paid over by him.
The Irish Society v. Needbam. 482

8. A bond and warrant of attorney to confess judgment, given by a bankrupt after his bankruptcy, in order to obtain his liberty, is not barred by his certificate, although the original debt was contracted before. Birch v. Sherland.

9. And if the obligor were in custody, charged in execution, it is not necessary that an attorney should be present on his part, at the time of executing the bond and warrant.

See Administrator. Surety. Sheriff.

### BOOKS.

1. Where a corporation is plaintiff in a civil action, leave to inspect their books is granted to the defendant of course.

The Mayor of Lynn v. Denton. 689

2. In cases of criminal prosecutions, and in an action for a penalty against a post-master on 9 Ann. c. 10. leave to inspect books has been denied. 689, n.

### BROKER.

See Commission del credere.

### BYE.LAWS.

1. A corporation, created by letters patent, with a power of making bye-laws, cannot make any laws to incur a forfeiture. Kirk v. Nowill. Page 118 2. Neither can a corporation, created by act of parliament, unless such a power be expressly given. ib

C.

### CANON. See Chichester Church.

### CARRIERS.

1. THE owner of a ship who takes goods for hire is not liable beyond the value of the ship and freight under 7 Geo. 2. c. 15. e. 1. in the case of a robbery, in which one of the mariners is concerned, by giving intelligence, and afterwards sharing the spoil. Sutton v. Mitchell.

2. A carrier who undertakes for hire to carry goods is bound to deliver them at all events, except damaged or des-

carry goods is bound to deliver them at all events, except damaged or destroyed by the act of God or the king's enemies; even though the jury expressly find that the goods were destroyed without any actual negligence in the carrier. Forward v. Pirtard. 27

3. A carrier is liable for inevitable accident, happening through the intervention of any human means, as by fire which began at another booth in a fair than that wherein the goods were placed and afterwards spread thither.

4. A carrier is in the nature of an insurer.
ib. 33
5. In an action by the consignor of goods against a carrier for non-deli-

goods against a carrier for non-delivery, where the plaintiff averred that the defendant undertook to deliver, &c. in consideration of the hire to be paid by the plaintiff, proof that the hire was to be paid by the consigner was held to be no variance; the consignor being by law liable. Moore v. Wilson.

CASE.

See Action on the Gase.

CASES doubted or denied.
Anonymous, Salk. 413. pl. 4. 380
Bellasie v. Burbrick, Salk. 413. ib.
Grentbam v. the Hundred of Ibeale. 3
Burr. 1723. 72
Long's case, 5 Co. 69

Pifford's case, 10 Co. 115. 72

Vaux's case, 4 Co. Page 69 Whitechurch, ex parte, 1 Atk. 58, 266

CATTLEGATE.

See Settlement by renting 101. a year.

CELLAR.

See Lease, 4.

CERTIFICATE.

See Bankrupt, 15, 16, 22. Settlement by certificate. Surety, 2.

CERTIFICATE, Game. See Costs, 8,

#### CERTIORARI.

1. No costs are due on a certiorari removing summary proceedings, unless a recognizance be entered into at the time of removing the proceedings. But it is discretionary in the court, whether they will grant a certiorari: and in future they will compel the party to enter into a recognizance This was in the case of a conviction on the lottery act. The King v. Jenkinson. 2. Under the 3d sect. of 5 W. and M. c. 11. for regulating the removal of indictments from the sessions by certiorari, the representatives of the prosecutor are entitled to the costs taxed during his life, though no personal demand was ever made by him. The King v. R. Chamberlayne. 103

CHAMBERS in the Inne of Court. See New-Inn.

CHARTERS. See Corporations. Quo Warranto.

CHARTER PARTY. See Covenant, 5, 7. Pleading, 19, 21.

CHATTEL INTEREST. See Devise, 7, 89.

CHICHESTER CHURCH. 1. A prohibition issued to the bishop of Chichester, who claimed a right to present by lapse, under pretence of his visitatorial authority, to the office of a canon residentiary of his church, it being a freehold office, and the right of election thereto in the dean and chapter. The Bishop of Chichester p. Harwood and Another. 650

2. Whether in case the dean and chapter neglect or refuse to appoint a ca-

non residentiary in proper time, the bishop by virtue of his general visitatorial power may appoint pro tempore till such election be had. Quere? P.650

3. A mandamus will lie to compel the dean and chapter to fill up a vacancy among the canons residentiary, and on such a mandamus the court will compel an election at the peril of those who resist. ib. 652

4. The election is in the dean and ca-

5. The dean has no casting voice. o. The canons have a right to vote by proxy.

7. There is no lapse to the bishop in the case of a canonry.

### CHOSE in action.

1. Though a chose in action cannot strictly in law be assigned, yet in equity it may: and in the case of a policy of insurance, the court will so far take notice of an assignment as to permit an action to be brought in the name of the assignor. Delaney v. Stoddard.

2. The assignor of a chose in action, who is become a bankrupt, may sue the debtor for the benefit of the assignee. Winch v. Keely.

CHURCH-WARDENS. See Overseers.

CLERK.

See Bond, 4, 5, 6.

COMMANDER, Officer, &c. See Agent. Action on the case, 2, 5, 7: Court-martial. False Imprisonment.

COMMISSION of bankrupt. See Bankrupt, - Commission of.

#### COMMISSION del credere.

1. Is an absolute engagement to the principal from the broker, and makes him liable in the first instance; so that the broker is liable at all events; though the principal may resort to the underwriter as a collateral security. Grove and Another v. Dubois. 2. A broker with such a commission may set off under the general issue a loss upon a policy, happening before a bankruptcy, to an action by the assignees of a bankrupt for premiums upon various policies underwritten by him,

and for which he had debited the bro-

ker:

her; but such a loss cannot be proved, See Devise, 3. under a notice of set-off. Page 112 3. Where a bankrupt has underwritten a policy to a broker acting under a commission del credere, and a loss upon the policy happens before but is not adjusted till after the bankruptcy, the broker may deduct the amount of the loss from the debt which he owes to the estate of the bankrupt, and if by mistake he pays it to the assignees, he may recover it from them as money had and received to his use. Bize v. Dickason and Another, assignees of Bartenshlag.

COMMITTITUR. See Practice, 6.

### COMMITMENT.

3. Whether justices of the peace have not the power of committing a pauper for refusing to answer questions relative to his settlement, " until he " shall answer." Quere? The King w. Jackson.

2. In the case of a bankrupt committed by the commissioners for refusing to be examined, he must send word when he will submit and answer the questions. ib. 654

See Practice, 6.

### CONDITION precedent.

s. No precise technical words are required in a deed to make a stipulation a condition precedent or subsequent; neither does it depend upon its being prior or posterior in the deed. But it must depend on the nature of the contract, and the acts to be performed by the contracting parties. Hotham v. the East India Company. 645

2. A covenant in a charter party, " that no claim should be admitted, or allowance made for short tonnage, unless such short tonnage be found and made to appear on her arrival, on a survey to be taken by four shipwrights, to be indifferently chosen by both parties," is not a condition precedent to the plaintiff's right of recovering for short tonnage; but is a matter of defence to be taken advantage of by the defendant: and the not averring performance is no ground for arresting the judgment.

3. If the defendants prevent the performance of a condition precedent by their neglect and default, it is equal to performance by the plaintiffs.

### CONSIGNMENT.

I. In an action by the consignor of goods against a carrier for non-delivery, where the plaintiff averred that the defendant undertook to deliver, &c. in consideration of the hire to be paid by the plaintiff, and proved that the hire was to be paid by the consignee, it was held to be no variance, the consignor being by law liable. Moore w. Wil-Page 658 See Bills of Lading, 1, 2.

CONSTABLE.

See Headborough.

CONSULTATION. See Modus, 1.

### CONTRACT.

1. Where goods are ordered for a ship by the owners, before the appointment of the captain, though some are not delivered till afterwards, yet as no personal credit is given to the captain, he is not answerable for any of them. Farmer v. Davies.

2. But where the captain contracts for the goods, though they are furnished for the use of the ship, he is answerable in respect of his contract.

So that in such case, the tradesman has a claim both on the captain and owners, as well as a specific lien on the ship itself.

4. Assumpsit for money had and received lies when a payment has been made on a contract which is put an end to. Towers v. Barratt.

5. But if it continue open, the plaintiff can only recover damages, for the breach of it, and then he must state the special contract.

6. The difference between those cases where the contract is open and where it is not so, is this; if the contract be rescinded, either as where, by the terms of it, it is left in the plaintiff's power to rescind it by any act, and he does it; or where the defendant afterwards assents to its being rescinded, the plaintiff is entitled to recover back his whole money; and then an action for money had and received will lie; but if the contract be open, the plaintiff's demand is not for the whole sum, but for damages arising out of it, and then he must state the special contract. 133 7. As

7. An officer appointed by government | 8. Conviction on the lottery act, 22 treating as an agent for the public, is not liable to be sued upon contracts made by him in that capacity. Mac beath v. Haldimand. Page 172 8. Not even though he contract by deed, if it be on account of government. Unwin v. Wolsely. 9. Where goods are delivered under an agreement to take a specific parcel of copper money in payment; a delivery of such copper will be a good bar to an action for the value of the goods, though in fact it was counterfelt money. Alexander v. Owen. 10. An illegal contract, if rescinded as to part, must be rescinded as to the whole: therefore if a plaintiff furnishes goods in consideration of counterfeit money to be paid him, and he afterwards retuses to take it, he cannot recover in an action the value of the goods delivered. ib.

226, 7 See Agreement. Usurious contract.

### CONVICTION.

1. Conviction quashed because the witness was not aworn and examined in the defendant's presence. The King v. T. S. Crowther. 125

2 It is not sufficient to read over the deposition of a witness in the defendant's presence. 3. But if the defendant confess the

charge, the irregularity is cured. The King v. S Hall. 320

4. In a conviction on the 5 An. c. 14. negative every specific qualification under the 22 and 23 Car 2. c. 25. The King v T. S. Crowther.

5. It is no objection to a conviction to state that the informer came and gape the justice to be informed, &c. in the preterperfect tense. The King v. 320 Samuel Hall.

S. Where an informer need not negative any of the exceptions in a statute, but negatives some of them only, that part of the information will be rejected as surplusage

7. Conviction on the 22 Geo. 3. c. 47. for insuring a ticket in the lottery authorised by 25 Geo. 3 quashed, because the information did not state that the ticket on which the insurance See Custom, 1. Purchase. was made, was a ticket in the State Lousey. The King o. Trelawney.

Geo 3. c. 47. quashed, because the evidence did not state the offence to have been committed where laid. The King v. Jefferies. Page 241 9 Conviction on the lottery act. 22 Geo 3. c. 47. for the said offence. where there are two distinct offences charged in the information, washeld bad. The King v. Salomons

10. Quere, Whether a person can convicted of two distinct penalties in the same information? but if he ought to be convicted of can, both?

11 An appeal against a conviction on 24 Geo 3 c. 21. for not entering horses, &c. must be to the quarter sessions next after the conviction and not after the execution. Prosser v. Hyde.

12. An unstamped agreement to sell a share of a ticket in the lottery, before the tickets are deposited with the commissioners, is within the penalty inflicted by 22 Geo. 3 c. 47. . 21. The King v. Hawkesworth.

CO-OBLIGOR. See Witness, 1.

COPYHOLD. I. Custom is the very essence of a copyhold; and if the custom be alent, the common law must regulate the course of descent. Denn dem Goodwin and Others v. Spray. for killing game, the evidence need not 2. The title to copyhold lands relates back from the time of the admittance to the surrender, as against all persons but the lord : so that the surrenderee may recover in ejectment against the surrenderor on a demise laid between the times of surrender and ad-Holdfast dem. Woolams mittance. v. Clapham. 3. The surrenderor before admittance is considered as a trustee for the surren-

And as between them adderee : mittance is not at all necessary to maintain ejectment. 4 Whether the surrenderee, before ad-

mittance, can recover against the lord, or a stranger, Quere?

CORPORATIONS. 222 Acceptance of charters, their validity, and

and pleadings in quo warranto informations. See The King v. Amery. Page 575

1. The statute 11 Geo 1. c. 4. was passed in order to secure the tranquillity of corporations; and to quiet possession. And the court are beamd to guard their peace. The King ve Stacey 3

2. Whether the court will grant an information in the nature of a quo warranto to impeach a derivative title, where a person from whom it was derived died in the undisturbed possession of it. Quere?

ib. 4

3. Such title shall not be impeached by those who have acquiesced and acred under it.

4. After the death of a mayor, Blackstone, J. would not suffer his eligibility to be disputed; but merely the fact whether he was mayor or not, which the corporation books shewed. And if in fact he had been mayor, it was to be taken that he had been regularly so. The King v. Spearing 1771, cited in The King v. Stacey. 4

5. A corporation created by letters patent, with a power of making byelaws, cannot make any laws to incur a forfeiture. Kirk . Nowill.

6. Neither can a corporation created by act of Parliament, unless such a power be expressly given.

ib.

See Quo warranto Informations. Books.

#### COSTS.

- 1. Where a new trial was granted upon a new ground, not opened at the first trial, it was ordered to be upon payment of costs. Sutton v. Mitchell.
- 2. A party grieved is entitled to costs in an action on 9 Geo. 1. c. 22. (for setting fire to plaintiff's house) against the hundred; although they together with the damages may exceed 2001. Jackson v. Calesworth.
- 3. Costs are always given in actions on the statute of hue and cry, where damages are recovered. ib. 72
  - 4. The statute of Glouester gives costs, where damages are given by any subsequent statute.

    ib. 73

5. No costs are due on a certiorari re-

moving summary proceedings, unless a recognizance be entered into at the time of removing the proceedings: but it is discretionary in the count whether they will grant a certiorar; and in future they will compel the party to enter into a recognizance. This was in the case of a conviction on the lottery act. The King v. Jenkinson.

Page 82

6. Under the 3d section of 5 W. and M. c. 11. for regulating the removal of indictments from the sessions by certiorari, the representatives of the prosecutor are entitled to the costs taxed during his life, though no personal demand was ever made by him. The King v. R. Chamberlayne.

 When costs are taxed, they become a debt vested, and will go to the personal representatives.

8. A person sued on 25 Geo. 3. c. 50. for shooting without a certificate, is not entitled to treble costs on obtaining a verdict; they being only due where a person is sued for any thing done in putting the act into execution, and obtains a verdict. Smith v. Wallis.

pleas, one of which is insufficient in law, and has a verdict on all the issues, except that joined on the insufficient plea, which is found for the defendant; and afterwards judgment is entered up for the plaintif; still he shall not be allowed any costs on the issue found for the defendant. Kirk v. Nowill and Another.

10. And if judgment had been arrested in that case, no costs would have been

given.

11. If the plaintiff reside abroad, the court will stay proceedings till be give security for the costs. Pray and

others v Edie. 267
12 So if the plaintiff reside in Ireland.
Fitzgerald v Whitmore. 362

13. Where a defendant removes proceedings by a recordari facias toquelam from a county court into one of the superior courts, and signs judgment of non pros. in default of the plaintiff's appearing, he is entitled to costs by 4 Jac. 1. c. 3 Davies a. James.

14. In future if an application is made to the court for a mandamum to a hishop bishop to license, &c. without good foundation, as if there is a specific legal remedy for the party, they will discharge the rule with costs. The King v. Bishop of Chester. Page 405

15. Where any one of several issues in a quo warranto information is found for the prosecutor, on which judgment of ouster is given, he is entitled to costs on all the issues. The King P. Downes.

16. Where the lessor of the plaintiff had abandoned his suit in another court, and brought a fresh ejectment in B. R. the court refused an application requiring him to give security for the costs. Doe dem. Selby v. Alston.

17. There are only three instances where the court will interfere to oblige the plaintiff to give security for costs. 1st. When an infant sues; in which case his proceen amy or guardian, or attorney, must give security. 2dly. When the plaintiff resides abroad. 3dly. Where there has been a former ejectment; in which case the court will stay proceedings in the 2d ejectment, till the costs of the former are paid.

18. A plaintiff is entitled to all the costs till the time of the defendant's paying money into court, activities anding he afterwards proceeds in the action. Hartley v. Bateson. 629 and Griffiths v. Williams.

19. Where a declaration in trespass consists of one count only, the defendant justifies part of it, and the plaintiff new assigns without taking issue on the special plea, and obtains a verdict, he is entitled to the costs of all the pleadings. Gundry v. Sturt.

20. The plaintiff is entitled to no more costs than damages in trespass for an assault, hattery, and tearing the plaintiff's clothes, if the jury find that the tearing was in consequence of the beating, and give less than 40s. damages. Cotterill v. Tolly.

See Attachment, 2. Modus, 1.

### COVENANT.

1. Whether bankruptcy is a plea to an action of covenant for rent, Quare?

Ludford v. Barber.

86

2. In the case of the South sea company, the act of parliament (which is

a public one) by which all their property was vested in trustees for the satisfaction of the creditors, was held no bar to an action of covenant. Hornby v. Houlditch. Page 93 3. A and B, covenant in a lease for 61 years, " that at any time within one year after the expiration of 20 years of the said term of 61 years, upon the request of the lessee, and his paying 6/. to the lessors, they would execute another lease of the premises unto the lessee, for and during the fur-ther term of 20 years, to commence from and after the expiration of the said term of 61 years, &c. And so in like manner, at the end and expiration of every 20 years, during the said term of 61 years, for the like consideration, and upon the like request, would execute another lease for the further term of 20 years to commence at and from the expiration of the term then last before granted," &c. Under this covenant the lessee cannot claim a further term of 20 years at the end of the lease, if he has omitted to claim a further term at the end of the first and second 20 years in the lease. Rubery v. Jervoise, and Another.

4. A lessee, who covenants to pay rent and to repair, with an exception of casualties by fire, is liable upon the covenant for rent, though the premises are burnt down, and not rebuilt by the lessor after notice. Befour v. Weston.

5. A covenant in a charter party, "that no claim should be admitted or allowance made for a short tonnage, unless such short tonnage be found and made to appear on her arrival, on a survey to be taken by four shipwrights to be indifferently chosen by both parties," is not a condition precedent to the piaintiff's right of recovering for short tonnage; but is a matter of defence to be taken advantage of by the defendant: and the not averring performance is no ground for arresting the judgment. Hotham The East India Company. 638

6. If a lessor covenant for quiet enjoyment against the lowful let, suit, entry, &c. of himself, his heirs and assigns, the declaration for a breach of the covenant need not expressly allege that he entered claiming title, if the disturbance

disturbance complained of be such as clearly appears to be an assertion of right. Lloyd v. Tomkies. Page 671 7. In covenant on a charter party, by which it was agreed to employ a ship of which the plaintiff was the captor, de soon de condemnation should bave passed, the sentence must be taken to mean a legal sentence; and the party who sues for the freight, must aver that the skip was condemned by a court having competent jurisdiction Unwin v. Wolseley. 674

8. U der a power to a tenant for life to lease for years, reserving the usual bovenants, &c. a lease made by him, containing a proviso, that in case the premises were blown down or burned, the lessor should rebuild, otherwise the rent should cease, is void; the jury finding that such covenant is unusual. Doe dem. Ellis and Medwin v. 705 'Sandham. See Settlement by Apprenticeship, 1

Trustees. Lease

COUNT.

See Pleadings, 8, 10, 11, 12. COUNTERFEIT Money.

See Contract, 9, 10.

COUNTY PALATINE. See Trial, 2, 3.

COURT. <sup>1</sup>See Money paid into Court.

COURT Inferior. 'See Inferior Court

### COURT MARTIAL.

I. It is not incident to the office of comauthority to hold a court-martial. Johnstone v. Sutton in Error. Excheq Ch.

2 An action upon the case will not fie for a malicious prosecution by a superior against any inferior fficer, before a naval court-martial, for an offence cognizable by it. Johnstone . Sutton in Error, in Excheq Ch

3. An action on the case for delaying to bring an officer under arrest to a naval court-martial will not lie; being a military offence, for which the defendant has not been tried by ib. 548 See Leder. court-martial. 'See False Imprisonment, 2.

CREDITOR. See Bankrupe, 12, 13, 22.

CURACY. See Assumpsit, 14, 15, 16, Mandsmus, 2.

CUSTODY. See Practice, 3, 17.

CUSTOM.

1. A custom within a manor, that lands shall descend to the eldest sixter, where there is neither a son nor a daughter, does not extend to an eldest niece; but the lands must descend according to the rules of the common law, in default of such son, daughter, and sister. Denn dens. Goodwin and Wragg et ux. v. Spray.

2 Custom is the very essence of a copyhold; and if the custom be silent, the common law must regulate the course of descent.

CUSTUMARY of a MANOR See Evidence, 9.

D.

### DAMAGES.

1. The court may in any case grant a new trial spon the ground of excessive damages. Ducker v. Wood. 277

See Goiss, 2, 3, 4,

#### DEBT.

l Bankruptey is a plea to an action of gebt on the reddendarm in a lease. Wadham'v. Marlowe. mander in chief of a squadron to have 2. When costs are taxed, they become a debt vested. The King a. R. Chamberlayne. 103

> DECLARATION. See Pleadings, 3, 6, 7, 8, 10, 11, 12, 13, 18, 19, 20. Practice, 3, 4, 5.

> > DEED.

493 See Estoppel, 1.

See Not Guilty.

DEL CREDERE. See Commission Det Gredere.

DEMISE.

DEMURRER.

DEMURRER.

1. Upon a demurrer to an indictment found in an inferior court, objections may be taken as well to the jurisdicsion of such court, as to the subject matter of the indictment. The King \* J. Fearnley. Page 316

2. And where the caption of the indictment stated the court of quarter sessions, where such indictment was found, to have been held on an impossible day, it was fatal. See Plendinge

DERIVATIVE TITLE. See Quo Warranto Information, 7, 8, 9.

DESCENT. See Custom. Evidence, 9.

DESTRUCTION.

See Waste.

DEVASTAVIT. See Not Guilty, 2.

DEVIATION. See Insurance, 3.4.

#### DEVISE.

1. Where the testator was seised of an undivided moiety of three tenements in A. and also of the reversion in fee, expectant on the death of J & of the other moiety, and also seised of lands leased on lives in B. and of other lands in possession in B. and of several other lands in G. and devised to N. P. "all that his part, purpart, and portion, of and in the tenement called A and also all his other lanus | 5. Where the testator "gave and bein fee-simple situate in B. and the reversion and remainder thereof," the whole of the testator's estate in A, whether in possession or reversion, passed to N. P. Doe dem. Phillips v 105 Paraips

2. A. ..evised lands in trust to pay the rents and profits to his daughter, (whise husband was then living,) for her life, notwithstanding her coverture, and not to be subject to any control, Gr. of ber busband, nor liable to a y debts which he bad or abould constact; afterwards the devisor made a codica, taking notice of the death of his daughter's husband, wherein he ratified and confirmed his said will. The usughter is entitled 8. But where there is no such express under this devise to the rents and

profits, &c. free from the control of any future husband. Beable v. Dodd.

Page 193 3. Where the testator had three sisters, (one of whom was married) and devised lands to trustees and their heirs. "In trust that they and their heirs should, during the life of the married sister, receive the rents and profits, and pay the same to the two other sisters, their heirs and assigns, and from and after the decease of the husband, in case the married sister should be then living, to the use of the three sisters severally in thirds for life, with several remainders to their first and other sons in tail, remainder to the daughters as tenants in common. with cross remainders between the sisters, on default of issue of their bodies respectively, remainder over in tail;" the condition of the married sister's surviving her husband is not annexed to any of the limitations, subsequent to the limitation of the life estate. And the remainder man in tail may alone make a good tenant to the præcipe upon the death of the three sisters without issue, notwithstanding the husband be then living. Horton v. Whittaker.

4 Under a devise to a wife for life, provided she remains a widow, but in case she marries a second husband, then to J. S. when he shall attain his age of 23 years, the wife has an absolute estate till J. S. is 23, though she marry before. Doe dem. dean and chapter of Westminster and Others v. Freeman and ux. 389

queathed to A his estate at B. and the rest of his effects, furniture, estates real and personal, to C.," A. took the estate at B. in fee, Holdfast, dem. Cowper v. Marten.

6. The word " estate" of itself carries a tee; and words of restraint must be added to make it carry less.

7. Where there is an express limitation of a chattel by words, which, if applied to a treehold, would create an express estate tail, the whole interest vests absulutely in the first taker a and a limitation over of such a chattel is too remote to take effect. Dee dem. Lyue v Lyde.

legal

legal limitation, the court will consider the meaning of the testator.

Page 596

9. So that where a term was bequeathed "to G. L. for life, and after his decease to Margaret his wife for life, and after the decease of the survivor to the children of G. L. share and share slike, and if G. L. died without issue of his body then to R. L for life, and after his decease to Mary his wife for life, with remainders over" the limitation to Mary was held good, G. L. dying without leaving issue, and R. L. dying during his life.

10. A devise to the right heirs of husband and wife is a devise to such person as answers the description of heir to both, namely, a child to both: and if no preceding estate be given to the father and mother, such child shall take as a purchaser. Roe dem. Nightingale v. Quartley.

11. Where the person to whose right heirs an estate is limited takes no estate himself, there his right heirs shall take as purchasers. ib. 634

See Power.

#### DIPLOMA.

See Game, 1, 2.

#### DISTRESS.

1. An agreement between the lessors and the assignee of the original lessee, " that the lessor should have the premises as mentioned in the lease, and should pay a particular sum over and above the rent annually towards the good-will already paid by such assignee," operates as a surrender of the whole term, and the sum reserved for good-will is to be paid annually in gross, not as rent, and the assignee cannot distrain either for that, or for the original rent; but he has a remedy by assumpsit for the sum reserved for the good-will. Smith v. Mapleback. 441

# DONATIVE.

1. Qu. How far the nature of a donative is changed by having been augmented by Q. Anne's bounty? The King v. Bishop of Chester. 397
2. In the case of a donative, the party is in full possession immediately on the nomination, and may maintain an action for money had and received

against any person who receives the rents and profits. ib. Page 403 3. But where a donative has been twice augmented, it should seem that the nominee cannot maintain such action without the bishop's license. ib. 404

R.

# EAST-INDIA COMPANY. See Covenant, 5.

#### EJECTMENT.

Ejectment for a messuage and tenement is good after verdict. Doe dem.
 Stewart v. Denton.
 11

 So is ejectment for a messuage or

tenement ib.

3. A surrender of chambers in New Inn to the treasurer and antients of the society, made with their assent, to the intent that they may grant the said chambers to a purchaser, passes the estate to such purchaser before admission: and therefore upon the death of the surrenderee before admission, the society may maintain ejectment for them. Doe dem. Warry and Others v. Miller and Another. 393

4. The title to convhold lands relates

4. The title to copyhold lands relates back from the time of the admittance to the surreuder against all persons but the lord; so that the surrenderee may recover in ejectment against the surrenderor on a demise laid between the times of surrender and admittance. Holdfast dem. Woollams a. Clapham.

5. Whether the surrenderee before admittance can recover against the lord, or a stranger, Quere?

6. The surrenderor before admittance is considered as a trustee for the surrenderee, and therefore is not permitted to set up a formal objection against the plaintiff's recovering that property which he holds for bis benefit.

7. A tenant to a mortgagor, who does not give him notice of an ejectment brought by the mortgagee to enforce an attornment, is not liable to the penalties of the 11 Geo. 2. c. 19. s. 12. for secreting ejectments. Buckley v. Buckley.

 The trustee of a term, not having notice of an agreement for a lease before the grant of the term, may maintain an ejectment against the tenant in

in possession under the agreement. See Costs, 16, 17.
Goodtitle dem. Estwick v. Way.

Page 735

9. One tenant in common cannot set up an outstanding unsatisfied term in bar to an ejectment for a moiety by another tenant in common. Doe dem. Bristowe v. Pegge. 759, n.

10. Where a trust term is a mere matter of form, and the deeds were muniments of another's estate, it shall not be set up against the real ow-

11. A trust shall never be set up in an ejectment against him for whom the trust was intended.

12. A tenant in possession under a lease, whose tenancy is not meant to be disturbed by the lessor of the plaintiff in ejectment, shall never set up his lease to bar the secovery.

13. A mortgagor cannot set up the title of a third person against his mortgagee in an ejectment. 2b.

14. Nor can a tenant set up the title of a third person in an ejectment to bar his own lessor. ib.

15. A second mortgagee who takes an assignment of a term to attend the inheritance, and has all the title deeds may recover in ejectment against the first mortgagee, not having had notice of such prior mortgage. Gooduile dem. Norris v. Morgan. 755

16. If a subsequent purchaser or mortgagee has notice of a former purchase or incumbrance, he shall not ayail himself of an assignment of an old outstanding term, prior to both, in order to get a preference. Willoughby v. Willoughby. 763

17. But if he had no notice of such prior incumbrance or purchase, and has the first and best right to call for the legal estate, then if he gets an assignment of it, a court of equity will not deprive him of his advantage.

18. If a second mortgagee lend his money upon an esstate, upon which there is an old outstanding term, and has notice at the same time of a certain incumbrancer prior to his own, the prior incumbrancer has the best right to call for the legal estate, and to satisfy himself of any other incumbrances upon the estate, although such other incumbrances were not known to the second mortgagee at the time he advanced his money.

See Costs, 16, 17.
Notice to quit. Cellar, or Lease, 4.

ENEMY.

See Insurance. Trade.

ERROR.
Assignment of—See Bankrupt.

Bail in ----

1. Bail in error must be put in within four days after final judgment signed; without reference to the time of the allowance, or serving the copy of it. Jacques v. Nixon.

2. As the bail in error cannot surrender the principal, they are not entitled to relief, though the principal become a bankrupt pending the writ of error. Southcote v. Braithwaite.

Writ of ---

 Though a writ of error be sded out before judgment signed, it cannot have any effect till the judgment is actually signed, Jacques v. Nixon.

And if a copy of the allowance be served before judgment signed, it only operates as an allowance from the time of signing judgment.

3. The service of the allowance is only to bring the party into contempt if he proceeds; for the allowance is of itself a supersedeas.

ESQUIRE.

See Game, 3.

ESTATE.

See Devise, 5, 6.

ESTATE TAIL, See Forfeiture, 3.

#### ESTOPPEL.

1. Where a person held under a lease from a tenant for life, in which the reversioner, who was then under age, was named, but it was not executed by him till after the death of the tenant for life. Quere? How far the lessee might have been estopped in an action of covenant brought by the reversioner, if he had not himself shewn these facts by his declaration, Ludford v. Barber.

2. A lessor is not estopped by his deed from going into evidence to shew

a cellar, which is situated under the demised premises particularly described, was not intended to be demised. Doe dem. Freeland v. Burt. Page 701

#### ESTRAY.

1. Trespass lies, and not case, for working an estray, although the original taking be admitted to be lawful.
Oxley v. Watta.

See Trespass. 5.

#### EVIDENCE.

1. A conviction on a penal statute must state that the witness was sworn and examined in the defendant's presence: it is not sufficient to read over the witness's deposition in the defendant's presence. The King v. T. S. Crowther.

2. In a conviction on the 5 An. c. 14. for killing game, the evidence need not negative every specific qualification under the 22 and 23 Car. 2. c. 25.

3. Acceptance of rent is only evidence of a holding from year to year where no other tenure appears, and may be rebutted by shewing notice to quit previous to such acceptance. Sykes dem. Murgatroyd and Wilkes v.—cor. Biackstone, J. York sum ass. 1774, cited in Right dem. Flower v. Darby and Another.

4. In ejectment. Eyre, Baron, held a notice to quit at Lady-day, to be presumptive evidence of a holding from Lady-day to Lady-day, till the contrary was shewn. Doe dem. Puddicombe v. Harris. Dorchester sum. des. 1784.

5. A custumary of a manor, appearing to be of great antiquity, and delivered down with the court rolls from steward to steward, although not signed by any person, is good evidence to prove the course of descent within the manor. Denn dem. Goodwin

& Wragg et ux. v. Spray. 466
6. A demise of premises in Westminster, late in the occupation of A. particularly describing them, part of
which was a yard, does not pass a
cellar situate under that yard, which
was then in the occupation of B. another tenant of the leasor: and the lessor, in an ejectment brought to recower the cellar, is not estepped by hisdeed fram going into evidence to show.

that the cellar was not intended to be demised. Doe dem. Freeland v. Burt.

Page 701

7. Whether parcel or not of the thing demised, is always matter of evidence.

iv. See Witness, Lease, 7. Order of Kemond, 2.

#### EXCEPTION.

See Statute.

#### EXECUTION.

1. An execution against the goods of a bankrupt, taken out after his certificate is signed by his creditors, and before it is allowed by the chancelor, is valid. Callen v Meyrick.

361

2. The statute 5 Geo. 2. c. 30 only relates to the discharge of the person of the bankrupt, who is in sustody on a judgment obtained before the allowance of the certificate.

3. Where two writs of fieri fasia: against the same defendant, are delivered to a sheriff on different days, and no sale is actually made of the defendant's goods, the first execution must have the priority, even though the seizure was first made under the subsequent execution. Hutchinson v. Johnston.

4. And if the person, claiming under the second execution, pay the sheriff the amount of the dobt under the first execution for his security, the court will not compel the sheriff to refund the money on motion.

5. But where the sheriff had given a bill of sale to the person claiming under the second execution, that was held to bind the sheriff. Rybot v. Peckham. 731. n.

6. The statute of frauds only secures the possession of innocent vendees under an execution: but as to the rest of the world, the goods are bound from the delivery of the writ to the sheriff. Hutchinson v. Johnson. 729 See Bankrupt, Commission of, 1 Insolvent Act, Practice, 11, Prisoner, 2.

# EXECUTORS and ADMINISTRATORS.

 Where a payee of a bill of exchange indorses it to A. and B. ps exceptors, they may declare as such in an action. tion against the acceptor. King and |2, It also lies where a captain of a man Others Executors, &c. v. Thom. The of war imprisoned the defendant three Same v. M'Linnan. Page 487

2. A plea of judgment recovered on a simple contract, pleaded by an administrator to debt on bond, must aver that such recovery was had before notice of the bond debt. Sawyer v. Mer-

3. Where the defendant bound himself. as administrator, to abide by an award to be made touching matters in dispute between his intestate and another; and the arbitrators awarded that he as administrator should pay, &c. he cannot plead plene administrator to debt on the bond; for by submitting to the award, he has admitted assets Barry v. Rush.

4. An executor's right is derived from the will, the probate is only evidence of it: Therefore he has a constructive possession from the testator's death. Smith and Another assignees of Clarke v. Mil e . 480

See Bond 4. Trade, 3, 4.

#### EXEMPTION.

1. The crown may exempt particular persons from serving the office of constable, or any other office under the erown, provided there be a sufficient number of persons left to serve the office. The King v. T. Clarke. 686 See Office.

### FACULTY.

Faculty is a good title to a pew. A See Pew.

2. A faculty to a man and bis beirs is

bad. Stocks v Booth. 3. If a faculty be annexed to a messuage, it may be transferred with the messuage to another person. ib. 431 4. There may be a faculty for exchang-

ing seats in a church. 5. There cannot be a gift of a pew to a ib.

man without a faculty. and Rogers v. Brooks. ib. n.

See Pew.

#### FALSE IMPRISONMENT.

· 1. This action lies against a superior. officer, where the imprisonment at See Tresputs, 2. first was legal, but was afterwards aggravated with many circumstances of cruelty, and was continued beyond necessary bounds. Wall v. Macna- 1 536 mara.

days for a supposed breach of duty, without hearing him, and then released him without bringing him, to a court-martial. Swinton v. Molloy. Page 537

FARMER.

See Bankrupt, 5.

FEME COVERT. See Baron and Feme.

FEME SOLE. See Baron and Feme.

#### FINES.

1. Under a bond of indemnity given A. that B. who was appointed general agent of C. the receiver of his rents, and the manager of his estates, should pay over to C. all rents which he should receive, as also the increase and improvements thereof upon any new contracts or renewals of leases; A is answarable for all fines received by B. on renewing the leases, which were not paid over by him. Irish Society v. Needham.

FIRE.

See Covenant, 4, 8.

FOREIGNERS. See Costs, 11, 12.

### FORFEITURE.

1 A corporation, created by letters patent with a power of making bye-laws, cannot make any laws to incur a forfeiture. Kirk v. Nowill. 2. Neither can a corporation created by act of parliament unless such a power is expressly given 3. A tenant for years, remainder to B. for life, remainder to the first and other sons of B. in tail, remainder to B. in tail; A. and B. join in a lease and release to make a tenant to the przcipe, and suffer a recovery; the estate tail limited to the sons of B. is not devested by the recovery, nor is there any forfeiture of the respective estates of A. and B. Smith dem. Rich-

FOX.

ards v. Clyfford.

### GAME.

A Diploma conterring .... doctor of physic, granted by either Diploma conferring the degree of

YoL I.

LIII

ther of the universities in Scotland, does not give a qualification to kill game under 22 & 23 C. 2 c. 25 Jones v. Smart.

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2. Neither is a doctor of physic of the English universities qualified as such. ib. 53

3. An esquire, or other person of higher degree, as such, is not qualified to kill game under 22 & 23 Car. 2. c. 25. but the son of an esquire, or the son of other person of higher degree is, 44. 53. 4. A conviction of the defendant, on the statute 22 & 23 Car 2. c. 25 as "not being the eldest son of an esquire," or of other person of high degree," is go d. King v. Utley. 24 Geo 3. circuin Jenes v. Smart.

### GAOLER.

1. A gaoler is bound to receive a prisoner tendered to him after the return day of the writ on which he is arrested. Brandling v. Kent. 60

2. Quere, Whether a gaster would be answerable for receiving a prisoner tendered to him, where the arrest was illegal on the face of the warrant; like the case of a pound-keeper?

GOODWILL.

See Lease, 3.

GOVERNMENT. See Agent, 1, 2.

GOVERNOR.

See Agent 1, 2.

GRANT.

See Way.

H.

#### HEADBOROUGH.

1. A younger brother of the corporation of the Trinity House is not exempt from serving the office of headborough by any of the charters grantred to the corporation. The King v. T. Carke. 679 See Exemption.

HERBAGE & PANNAGE. See Poor Kate, 2, 3.

HOLDING

Sec Evidence, 4.

HORSES

See Quarter Sessions,

HOSTAGE.

1. A promise by a captain of a ship on behalf of his owners, when the ship was taken, to pay monthly wages to one of the sailors, in order to induce him to become a hostage, is binding on the owners, although they abandon the ship and cargo. Yates v. Hall.

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HUE and CRY.

1, Quere. Whether before the statute of hae and cry, the party robbed could have had an action against the hundred to recover damages for not keeping watch and ward? Jackson w. Calesworth.

2 Costs are always given in actions on the statute of hue and cry where damages are recovered. ib.

HUNDRED.

See Costs, 2, 3, 4, Hue and Cry.

HUNTING.

See Trespass, 2.

See Abatement, 1, 2.

inclusive.

**JEOFAILS** 

1. Statute of jeofails will not assist on a writ of error from an inferior court, where one of two counts in a declaration is not laid within the jurisdiction, and the damages are general. Trever v. Wall.

IMPRESSING.

See Pleading, 6.

INDEMNITY.

See Bond, 4, 5, 6, 7. Trustees.

# INDICTMENT.

1. Upon a demurrer to an indictment found in an inferior court, objections may be taken as well to the jurisdiction of such court as to the subject matter of the indictment. The King e. J. Fearnley.

2. And where the caption of the inductment stated the court of quarter sessions, where such indictment was f. und, to have been held on an impassible day, it was fatal.

See Perjury.
INFANT.

1. Assumpsit on an account stated does ot lie against an infant, Trueman v. Hurst. 40

2. Even

2. Even though the particulars of the account were for necessaries. Bartlett v. Emery. H. 2 G.2. B. R cited in Trueman v Hurst. Page 42

3. In replying to a plea of infancy the plaintiff must shew enough in the replication to maintain every part of the declaration: and if a replication, which is entire, be bad as to part, it is bad as to the whole.

4. It seems that an infant may bind himself by a promissory note given for necessaries, and for instructing him in the business of a hair dresser. ib. 40

5. If the plaintiff reply to a plea of infancy, that the defendant, after he had attained 21, confirmed his promise, and the defendant rejoin that he did not, the plaintiff need only prove a promise, and the defendant | See Perjury, 4, 5. must shew that he was under age at the time. Borthwick v. Carruthers

# INFERIOR COURT.

1. In an inferior court the declaration must allege, that the money was bad and received within the jurisdiction, as well as that the defendant promised to pay within it. Trevor v. Wall. 151 2. Where one count of a declaration in an inferior court is not laid within the jurisdiction of that court, and the damages are given generally the objection is fatal upon a writ of error, although there is another good count

3. The statute of jeofails will not assist on a writ of error from an inferior See Books. court, where one of two counts in a declaration is not laid within the jurisdiction, and the damages are ge-

4. Upon a demurrer to an indictment found in an inferior court, objections may be taken as well to the jurisdiction of such court, as to the subject matter of the indictment. The King v. J. Fearnley. 316 See Indictment, 1, 2. Venire de novo, 1.

# INFORMATION.

1. Wherever magistrates act uprightly, though they mistake the law, no information will be granted against them. The King v. Jackson. 2. An information will be granted against a justice of the peace as well for granting as for refusing an ale-li-

cence improperly. The King v. Holland and Foster. Page 692 See Conviction. Corporation. Game 4. Duo wari anto.

#### INN KEEPER.

1. An inn-keeper, who sells liquor out of the house to all customers applying for it, is subject to the bankrupt laws, however inconsiderable the extent of such dealing, and the profits arising from it, may be. Patman v. Vaughan.

INNS of COURT. See New Inn.

INSIMUL COMPUTASSET. See Infant, 1, 2.

INNUENDO.

# INSOLVENT ACT.

1. A general judgment, signed by virtue of a warrant of attorney given before the passing of an insolvent act, of which the defendant is entitled to take advantage by pleading in discharge of his person, &c will not warrant a special execution under the act. But the court will give the plaintiff leave to plead the insolvent act for the defendant, and sign a special judgment under it; for the warrant of attorney will preclude the defendant from saying there is no debt. Buxton and Another v. Mardin.

# INSPECTION.

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Insurance, Insured, Insurer.

1. Where an insurance was ordered by the principal to be made as soon as a letter was received from his agent; and that agent when he wrote the letter knew nothing of the loss of the vessel, but had an opportunity by the course of the post of contradicting the contents of it, and transmitting intelligence of the loss before the insurance was effected, and neglected to do so; the policy is void on the ground of misrepresentation, though the assured himself knew nothing of the loss. Fitzherbert w. Mather.

2. Any person acting by the orders of the insured, or his agent, and who is any wise instrumental a procuring the insurance, is bound to disclose all

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he

he knows to the underwriter before 8 Where a policy does not appear the policy is effected; and where any misrepresentation arises from his fraud or negligence, even without the privity of his employer, the policy

Page 12 is void. 3. Insurance on the ship Friendship 9. When an embargo had been laid o " at and from St. Kitts to London, warranted to sail with convoy on or before 1st of August." The ship, after taking in part of her cargo at St. Kitts, was driven out of her port, and obliged to go into St Eustatia. When she was there she made several efforts to get back to 8. Kitts to finish her loading; but not succeeding, was sold by the plaintiff to Mr. Ross of St. Eustatia, and completed her loading there; and afterwards sailed on the 1st of August from thence with convoy for London, but was lost in the course of the voyage. It appeared that St Enstatia is in the direct road to London from St. Kitts, and that the convoy from St. Kitts alwas looked into St. Eustatia to take up any ships that might be there. That it the ship had sailed immediately from-St. Kitts she must have gone by St. Eustatia; but would not have stopped there. And it was also proved to be the custom, that where a

captain had not taken in his full cargo at St. Kitts, he should take in the rest at St Eustatia. The court under these circumstances, held the going to St. Eustadia, and the finishing the loading there, not to be a deviation, so as to discharge the policy. Delaney v. Stoddart.

4. If a ship be driven out of her loading port and obliged to go into ancther port, and after fruitless attempts to het back again, she does the best she can to get from thence to the place of her destination; that will not be considered as a deviation. ıb.

5. Ne ther does it vacate the policy, it Buch ship complete her loading at the port into which she is so driven. the principal case, however, there was a custom to warrant this.

6. A policy may be transferred, and aaction mentioned in the name of the assignor.

7. It is not yet determined that policies on eutral property, though bound to an enemy's port, are void. Gist v. Mason: 84

the face of it to be illegal, the court will not grant a new trial, in order to let the defendant into proof that it was so; but he should have shewe it on the trial.

provisions in Ireland, an insurance on such provisions from thence, laden a board a vessel bound to an enemy's port, was held void. Dalmady Motteaux. 85. =.

10. Seamen's wages and provisions are not covered by an insurance on the body of the ship. Robertson w Ewer-127, 132. n. a.

11. The assured cannot recover upon the policy, unless the loss be a direct and immediate consequence of the peril insured; so that slaves who die by any other means than by wounds or bruises received in the very act of quelling a mutiny, are not within that provision of an African policy, which insures against loss by mutiny. Joues v. Schmall. 130. n. a. 12. Owners of ships are not entitled to abandon, unless at some period of the voyage there has been a total loss; and where the jury have found only an average loss, occasioned by the perils of the sea, the court are precisded from saying there has been a total loss. Cazalet and Others v. St. Barbe.

13. If the ship arrive safe, the circumstance of her not being worth repairing will not make it a total loss.

14. The nature of a policy is an insurance on the chip for the voyage. If either the ship, or the voyage, be lost, it is a total loss. ib. 191 15. A ship being insured for a voyage, the underwriter is not liable for any loss arising from seizure, after she bas been 24 bours in port; though such seisure was in consequence of an act of barratry, committed by the master, by smuggling during the voyage. Lockyer and Others v. Offey. 16. The underwriter is in no instance liable for any loss which happens after the vessel has been moored 24 hours in safety; alth ugh such loss should arise from some previous damage sustained during the voyage. ib. 261

17. Where a ship was insured for six months; and three days before the expiration

expiration of the time she received her death's wound, but was kept affoat by pumping till three days after the me, the underwriter was held discharged. Meretony v. Danlap, E 23 Page 261 Geo. 3. cited per cur. 18. Insurance on a life for a year, if the person die after the expiration of it. though in consequence of a mortal wound received before, the insurer ib. 260 is discharged. 19. Money having been expended in reclaiming a cargo on board a ship captured, was insured by the owners word the event of the ship's arrival at Marseilles: The ship being captured, and restored upon appeal, relinquished her voyage and was afterwards lost; pending the appeal, the goods were ordered to be sold, and the expences of the appeal were afterwards defrayed therewith; an averment of a loss by capture was held bad, because the ship might, notwithstanding the capture, have afterwards arrived at Marseitles. Kulen Kemp v. Vigne. 10. Such a policy being a wagering policy, the assured could not at any time ebendon. 21. If an agent effect a policy without inserting his name as agent, such policy was void by the 25 Geo. 3. c. 44. Pray v. Edie. 313

22. Whether an agent, effecting a policy for his principal residing abroad, must not reside in England? Quere.

23. Barratry can only be committed by the master or mariners against the owner of the ship, and without his consent. Nutt o. Bourdieu. 323

24. The owner of the ship cannot commit barratry, he may make himself liable to the owner of the goods by his fraudalent conduct, but not as for barratry.

25. Difference between a representation and a warranty: the former may be substantially, the latter must be strictly, complied with. De Hahn v. Harrley.

A warranty in a policy of insurance is a condition; and unless it be performed there is no contract.
 Whatever is written in the margin of a policy of insurance is a warranty.

28. According to 25 Geo. S. c 44. the mame of the party interested must have been inserted in a policy of insurance,

otherwise he could not recover upon Cox . Parry. Page 464 29 When the assured receive intelligence of such a loss as entitles them to abandon, they must make their election in the first instance; and if they abandon, they must give the underwriters notice in a reasonable time. otherwise they wave their right to abandon, and can only recover as for an verage loss. Mitchell v. Bdie. 608 30. The owners of goods insured, by the act of shifting the goods from one ship to another, do not preclude themselves from recovering an average loss arising from the capture of that other ship, if they acted for the benefit of all concerned. Plantamour v. Staples. 611, n a.

See Abandonment, Barratry. Bills of Laling. Commission des credere.

## JOINT OBLIGATION.

1. Where two united parishes elected a sexton jointly, who was paid a certain sum by each, the obligation is not joint, for the sexton cannot bring his action against one of the parishes for the whole sum. Stokes and Another v. Lewis and Another. 22

JUDGES.

Appointed, 371, 551.

# JUDGMENT.

1. Where two judgments are signed on the same day, the priority of one cannot be averred. Lord Porchester v. Petrie.

2. A supersedeas obtained after judgment cannot be pleaded in bar to an action on such judgment. Topping v. Ryan.

3. Where the same plea may be pleaded, and the same judgment given on two counts, they may be joined in the same declaration. Brown v. Dixon. 274. Where a prisoner in execution is discharged by the consent of his creditor, upon giving a fresh security to satisfy the judgment; and that security is afterwards set aside on account of a mere informality; the judgment is satisfied; and cannot be set off against a demand of the prisoner. Jaques v. Withy.

5. If an action be brought on a judgment recovered in this court, and after judgment the defendant brings a writ of error, and obtains a rule to stay

proceedings

plaintiff dies before judgment affirmed, the court will not permit judgment to be entered nunc pro tune. Bates e. Lockwood. Page 637

6. But if the action be brought in B. R. on a judgment recovered in the common pleas, the court will not stay proceedings pending a writ of error,

without the defendant's giving judgment in the second action.

7. In a plea of judgment recovered on a simple contract, pleaded by an administrator to debt on bond, he must aver that such recovery was had before notice of the bond debt. Sawyer 690 . Mercer.

See Practice, 15, 16, 18, 28.

Judgment Of non Proc.

1. The defendant is bound to search in the office whether the plaintiff has brought in the issue roll, immediately before he signs judgment of non pros; even though he may have searched on another day, on the expiration of the rule to bring in the roll. Minns v. Baxter.

2. The general rule respecting signing judgment for non-appearance is that, where by the writ each party has a day in court, and the defendant may be damnified by not appearing, he may appear, and demand the plaintiff; and if the plaintiff does not appear, the defendant is entitled to sign judgment, and to have his costs, and this even tho' the writ be not returned, as upon a capias, exigent, or distringas. Davis v. James.

JURISDICTION. See Inferior Court. Insolvent Act.

JURY and JUROR.

1. Affidavit of a juror that the jury, having been divided, tossed up, and that the plaintiff had won, rejected; for such conduct is a very high misdemeanor in the juror himself. the information must come from some other source; such as from some person who had seen the transaction through a window or the like. Vasie See Chichester Church, 1, 2, 7. v. Deleval.

JUSTICES.

1. Wherever justices of the peace act uprightly, though they mistake the

proceedings in the mean time, and the against them. The King v. Jackson. Page 653

> 2. Whether justices of the peace have not the power of committing a panper for refusing to answer question s relative to his settlement? ä.

> 3. An information will be granted against a justice of the peace as well for granting as for refusing an ale licence improperly. The king v. Holland.

> > JUSTIFICATION.

1. A justification to an action for a libel, for charging the plaintiff with being a swindler, must state the particular instances of fraud, by which the defendant means to support it. J. Anson v. Stuart.

2. A general justification in the words of such charge is not sufficient.

See Slander, 2. Trespass, 2.

LANDLORD and TENANT.

 A lessee, who covenants to pay rent and to repair, with an exception of casualties by fire, is liable upon the covenant for rent, though the premises are burned down, and not rebuilt by the lessor after notice. Belfour v. Weston. 310

2. A tenant to a mortgagor, who does not give him notice of an ejectment brought by the mortgages to enforce an attornment, is not liable to the penalties of the 11 Gev 2 c. 19. c. 12. for secreting ejectments. Buckley v. Buckley. See Covenant, 3, 4, 6, 8. Lease. Notice

to quit. Headings, 13.

LAND-TAX-ACT.

1. The appointment of clerks to the commissioners under the land-tax act. 25 Geo. 3. c. 4. is at least for a year. The King v. The Commissioners of the land-tax for St. Martin's Westminster. 149 See Mandamus, 1.

LAPSE.

LATITAT.

See Practice, 2, 4, 5.

LEASE. law, no information will be granted 1. A lease executed by the tenant for life

life (in which the reversioner, who was then under age, is named but not executed by him) is void on the death of the tenant for life; and an execution by the reversioner only afterwards is no confirmation of it, so as to bind the lessee in an action of covenant. Ludford v. Barber. Page 86 2. A. and B. covenant in a lease for 61 years, "that at any time within one year after the expiration of 20 years of the said term of 61 years, upon the request of the lessee, and his paying 61. to the lesors, they would execute another lease of the premises unto the lessee, for and during the further term of 20 years, to commence from und after the expiration of the said term of 61 years, Uc. And so in like manner, at the end and expiration of every 20 years, during the said term of 61 years, for the like consideration, and upon the like request, would execute another lease for the further term of 20 yaars to commence at and from the expiration of the term then last before granted, &c. under this covenant, the lessee cannot claim a farther term of twenty years at the end of the lease, if he has omitted to claim a further term at the end of the first and second twenty years in the lease. Rubery v. 229 Jervoise and Another.

3. Where a lease came into the hands of the original lessor, by an agreement between him and the assignee of the " that the lessor original dessee, should have the premises as mentioned in the lease, and should pay a particular sum over and above the rent annually towards the good will already paid by such assignee;" such agreement operates as a surrender of the whole term. And the sum in the agreement is considered as a sum to be paid annually in gross, not as rent; and the assignee cannot distrain either for that or for the original rent : but he has a remedy by assumpsit for the sum reserved for the good-will. Smith v. Mapleback.

4. A demise of premises in Westminster, late in the occupation of A. particularly describing them, part of which was a yard, does not pass a cellar situate under that yard which was then in the occupation of B. another tenant of the lessor. And the lessor in an ejectment brought to receiver the cellar is not estopped by his deed from going into evidence to shew that the cellar was not intended to be demised. Doe dem. Freeland v. Burt. Page 701

5. Under a power to a tenant for life to lease for years, reserving the usual covenants, &c. a lease made by him, containing a proviso that in case the premises were blown down or burned, the lessor should rebuild, otherwise the rent should cease, is void; the jury finding that such covenant is unusual. Doe dem. Ellis v. Sandham,

6. A paper, containing words of present contract, with an agreement that the lease should take possession immediately, and that a lease should be executed in future, operates only as an agreement for a lease, and not as a lease itself; and therefore it need not be stamped, if executed before the 28 Geo. 3. c 58. Goodtitle dem. Estwick v. Way.

7. A lease in writing though not under seal, cannot be given in evidence unless it be stamped.

See Bonds. Covenant, 4. 6. 8. Landlord and tenant. Notice. Evidence, 4.

## LECTURER.

1. The court will not grant a mandamus to a bishop to license a lecturer without the consent of the rector, where the lecturer is supported by voluntary contributions, unless an immemorial custom to elect without such consent is shewn. The King v. the Bishop of London.

# LENGTH of Time. See Presumption.

#### LETTERS PATENT.

1. Where the defendant preaded letters patent to a quo warranto information, and made a profert of them, the court refused Oyer in another term from that in which the profert was made. The King v. Amery. 149 2. A patent is void if the specification has applications or give directions which

be ambiguous, or give directions which tend to mislead the public. Turner v. Winter. 602

So if the patentee say that by one process he can produce three things, and he fail in any one.
 So if the specification direct the same thing to be produced several

ways,

way, or by several different ingredients and any one of them fail. Page t02

#### LIBEL.

2. The venue in an action for a libel cannot be charged. Pinkney v. Collins. 571, and Clissold v. Clissold.

2. To print of any person that he is a swindler, is a libel, and actionable. J. Anson v. Stuart.

3. A justification of such a charge must state the particular instances of fraud, by which the defendant means to support it.

4. A justification generally in the words of the libel where the libel is general is not sufficient. See Slander.

# LICENCE of the BISHOP.

s. The court will not grant a mandamus to a bishop to license a curate of an augmentated curacy, where there is a cross nomination, because the party has another specific legal remedy by a Quare impedit. Bishop of Chester-The King o. the

2. The bishop's licence is necessary to the nominee of a perpetual curacy, to enable him to maintain an action for money had and received against any person who receives the profits. Powel v. Millbank. M. 12 Geo. 3. B. R. 399, n.

S. But it is not necessary for that purpose to the nominee of a donative. The King v. the Bishop of Chester. 403

4. But where a donative has been twice augmented, it should seem that the nominee cannot maintain such action without being licensed. See Costs, 14.

#### Lien.

See Contract, S.

LIMITATION.

See Device.

LOTTERY ACT. See Affidavit, 3. Conviction, 7, 8, 9, 10, 12.

M.

MALICIOUS Prosecution. Action on the See Court Martial.

#### MANDAMUS.

1. The court granted a mandamus, directed to the commissioners of the land-tax is A to elect a clerk to them in the department for the rates and duties on windows, houses, and lights. The King w. the commissioners of the land-tax for St. Martin's Westmin-

2. They will not grant a mandamus to a bishop to license a lecturer, without the consent of the rector, where such lecturer is supported by voluntary contributions, unless an immemorial custom to elect without such consent is The King w. the Bishop of shewn. London.

Where a parish consists of several townships, some of which maintain their own poor, and have overseers separately appointed, the court will grant a mandamus for the separate appointment of overseers for the remaining townships. The King v. Sir Watts Horton and Another, 374 See Overseers.

4. A mandamus to a bishop to license a curate of an augmented curacy, where there was a cross nomination, refused, because the party had another specific legal remedy by Quare impedit. The King v. the Bishop of Chester.

5. Wherever a party has a specific legal remedy, the court will refuse to grant a mandamus.

6. Every rule to shew cause why a mandamus should not issue to compel a bishop to license, &c. obtained without foundation, will be dismissed with costs. iЬ.

7. Mandamus to the mayor, &c. of London to admit a person to the office of auditor of the Chamberlain's and Bridgemaster's accounts, who had served it three years successively, and been elected again the fourth year by the delivery, refused; because the custom of the city appeared to be, that no person should be elected to, or serve, the said office for more thin two care successively. The King v. the Mayor and Asserment of London. See Chichester (.burch, 3. Overseers.

#### MANOR.

See Custom, 1.

# MARRIAGE.

1. Bastards are within the meaning of

the marriage act. 26 Geo. 2. c. 33. which requires the consent of the father, guardian, or mother, to the marriage of persons under age, who are not married by banns. The King v Hodnett,

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MARRIAGE Settlement. See Trustees.

MARSHAL.

See Practice, 17.

MASTER and Mariners.
See Bill of lading. Contract, 1, 2, 3.
Hostage. Insurance, 15. Ship.

MASTER and Servent.
See Settlement by biring and service,
Slander.

MIDDLESEX, Bill of. See Practice, 2.

#### MODUS.

1. If a modus be not proved as laid by the plaintiff in a suit in prohibition, there must be a verdict for the defendant, who is entitled to costs. But if any modus be found, though different from that laid, that is a ground for the court to refuse a consultation. Brock v. Richardson, 427

Where a modus is pleaded in an ecclesiastical court, a prohibition may be granted any time before final sentence. Darby v. Cosens.

MONEY bad and received. See Assumpsit.

MONEY paid into court.

1. Payment of money into court is only an acknowledgment by the defendant that the plaintiff is entitled to recover the sum so paid: but it does not preclude him from taking any objection to the action beyond that sum; though unless such sum were paid, such objection would be a bar to the plaintiff's action. Cox and Another Executors of Shultz v. Parry.

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2. If the defendant pay money into court, the plaintiff is entitled to costs, till that time, notwithstanding he afterwards proceeds in the action. Hartley v. Bateson, 629. Griffiths v. Williams.

710. S. P.

3. Paying money into court, where the demand is for unliquidated damages,

by a judge's order after plea pleaded, is irregular: but if the plaintiff take the money out, he thereby waves the irregularity, and cannot afterwards have a verdict, unles he recover more than the sum paid in. Griffiths v. Williams.

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MORTGAGE. MORTGAGOR, &c. 1. A tenant to a mortgagor, who does not give him notice of an ejectment brought by the mortgagee to enforce an attornment, is not liable to the penalties of the 11 Geo. 2. c. 19. c. 12. for secreting ejectments. Buckley v. Buckley.

A mortgagor cannot set up the title
of a third person against his mortgagee in an ejectment. Doe dem. Bristowe v Pegge. 759. n.

3. A second mortgagee, who takes an assignment to attend the inheritance, and has all the title deeds, may recover in ejectment against the first mortgagee, if he has no notice of such prior mortgage. Goodtitle dem. Norris o Morgan. 755

4. If a subsequent purchaser or mortgagee has notice of a former purchase or incumbrance, he shall not avail himself of an assignment of an old outstanding term prior to both, in order to get a preference. Willoughby v. Willoughby, in Ghanc. 763

5. But if he had no notice of such prior incumbrance or purchase, and has the first and best right to call for the legal estate, then, if he gets an assignment of it, a court of equity will not deprive him of his advantage.

6 If a second mortgagee lend his money upon an estate, upon which there is an old outstanding term, and has notice at the same time of a certain incumbrance, prior to his own, the prior incumbrancer, having the best right to call for the legal estate, may satisfy himself of any other incumbrances upon the estate, although they were not known to the second mortgagee at the time he advanced his money. ib. For the relative situations and powers of mortgagor and mortgagee.—See Birch e. Wright.

N.

See Ejectment.

NEW ASSIGNMENT.

THE second count in trespass, (being a general one) does not always

ways avoid the necessity of a new assignment: it is added in order to avoid the locality. But there cannot be a new assignment, except where there is a special plea: and if the case be such that, on a special plea, the plaintiff may be driven to a new assignment, he may give the matter in evievidence under the second count on Smith and Another asnot guilty. signees of Clarke v. Milles. Page 479

#### NEW INN.

1. A surrender of chambers in New-Inn to the treasurer and antients of the society, made with their assent, to the intent that they might grant them to a purchaser, passes the estate to such purchaser before admission; and therefore in case of the death of the surrenderee before admission, he having only a life estate, the society may maintain ejectment for them Doe dem. Warry and Others v. Miller and 393 Another executors.

NEW TRIAL.

See Costs, 1.

NON PROS, Judgment of: See Judgment.

#### NOT GUILTY.

1. Qu. ? Whether it may not be pleaded to an action of debt on a penal statute? Coppin qui tam v. Carter.

2. Upon a devastavit against executors, not guilty may be pleaded as well as nil debet.

NOTE PROMISSORY. See Bills of Exchange. Evidence, 7. Witness, 7, 8.

### NOTICE.

1. Notice of an appeal against a poor rate must be given to the churchwardens or overseers of the parish making the rate, by the 17 Geo. 2. c 38. The King v. the Churchwardens, &c. of Maddern.

But it is not necessary for the appellant to give notice to the person whose name is omitted in the rate,

See Bill of Exchange, 2, 3, 4, 5, 6, 11, 12 16, 17. Insurance, 29. Pleading, 22.

#### NOTICE TO QUIT.

If a landlord give notice to his tenant to quit at the expiration of the lease, See Judgment, 5.

and the tenant hold over, the landlord is entitled to double rent : and a second notice delivered to the tenant after the expiration of such notice, to quit on a subsequent day, or to pay double rent, is no waver of such first notice, or of the double rent which has accrued under it. Messenger v. Armstrong.

Page 53 2. Where the term of a lease is to end on a precise day, there is no occasion for a notice to quit; because the lease is of course at an end, unless the parties come to a fresh agreement. ib. 54. Right dem. Flower v Darby and another.

3. In the case of a tenancy from year to year, there must be half a year's notice to quit, ending at the expiration of the year. Right dem. Flower v. Darby and Another

4. Six months notice is not sufficient. ib. 163

5. There is no distinction between houses and lands, as to the time of giving notice to quit. ib. 162, 3 6. Where one in remainder, after the expiration of an estate for life, gave notice to the tenant to quit on a certain day, and afterwards accepted half a year's rent; such acceptance, being only evidence of a holding from year to year, is rebutted by the previous notice to quit; and therefore the notice remains good. Sykes dem. Murgatroyd and Wilkes v. -Blackstone J. York sum. ass. 1774, cited in Right v. Darby.

7. In an ejectment brought by Mr. Duncombe, he could not prove the time when the term commenced, and the tenant proving it to be different from the time to quit mentioned in the notice, the plaintiff was nonsuited. Cor. Lord Mansfield at G. H. ib. 161

8. In ejectment, Eyre, Baron, held a notice to ou t at Lady-day to be prima facie evidence of a holding from Ladyday to Lady-day, till the contrary was shewn. Doe dem. Puddicombe v. Harris. Sum. ass. 1784, at Dorchesib. 161

9. Tenant from year to year before a mortgage, or grant of the reversion, is entitled to six months notice to quit beiore the end of the year from the mortgagee, or grantee Birch v. Wright. 380 & 382

NUNC PRO TUNC.

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### OBLIGATION.

See Joint Obligation, 1.

#### OFFICE.

THE crown may exempt persons from serving the office of, constable, or any other office under the crown, provided there be a sufficient number of persons left to serve the of-The King v. T. Clarke P 686 2. A younger brother of the Trinity House is not exempt from serving the office of headborough or constable. ib. See Mandannus.

OFFICER, COMMANDER, ಆಂ. See Action on the case. Agent, 1, Court Murtial. False Imprisonment.

ORDER OF JUSTICES. See Order of Removal. Settlement.

#### ORDER OF REMOVAL.

1. An order of justices removing nurse children to their derivative settlement without taking notice of the death or settlement of the parents, is good. The King v. The Inhabitants of Buc-164 klebury.

2. The evidence of the father in such case may be dispensed with, where his attendance cannot be procured.

An order of removal, unappealed from, is only conclusive on those who are mentioned in it. So that if only the father and mother be removed thereby, the question relative to the settlement of their children is still open. Rex v. Southowram. 353

#### OVERSEERS.

1. A specific sum of money received by an overseer of the poor is not such a debt as can be proved under a commission of bankrupt against him, before his accounts are delivered in. ვ69 The King v. Egginton.

2. Where a parish consists of several townships, some of which maintain their own poor, and have overseers separately appointed, the court will grant a mandamus for the separate appointment of overseers for the remaining townships. The King v. Sir W. Horton and Another.

3. Where such a parish has immemorially had more than four overseers, that is a proof that they cannot have 1. If the detendants prevent the per-

tles each township to have separate overseers. Page 374 4. Wherever there is a constable, there, &c., there is a township. ib.

5. To entitle any district of a parish to have separate overseers, it must be shewn to be a township; and that the parish cannot have the benefit of the 43 Eliz that is, cannot maintain their own poor as a parish. ib. 376, 7

# OWNERS OF SHIPS.

See Ship. Ransom Bill.

#### OYER.

1. The defendant having pleaded letters patent to a quo warranto information. and made a profert of them, oyer was refused in another term from that in which the profert was made. 149 King v. Amery. 2. Oyer of a record is never granted. ib.

PALATINE-COUNTY. See Trial, 2, 3.

PARISH.

See Overseers.

PARK.

See Poor Rate, 2, 3.

#### PATENT.

See Letters patent.

#### PAUPER.

1. Where an allowance is ordered to be paid weekly to a pauper it is due at the beginning of the week. The King v. J. Fearnley:

2. Whether justices of the peace have not the power of committing a pauper for refusing to answer questions relative to his settlement. Quere? The King v Jackson.

See Further relative to Paupers; Appeal. Certificate. Order of Removal. Settlement.

PAYING MONEY INTO COURT. See Money paid into Court.

PENAL STATUTE. See Not Guilty. Statutes.

#### PERFORMANCE.

the benefit of the 43 Eliz.; and enti- | formance of a condition precedent by their

their neglect and default, it is equal to | performance by the plaintiffs. Hotham v. The East India Company. Page 645

PERIURY

1. To found an indicament for perjury the requisite circumstances are these; the oath must be taken in a judicial proceeding, before a competent juris-.diction; and it must be material to the question depending, and false. King v. E. Aylett.

2. In the indictment there must be an allegation of time and place, which are sometimes material and necessary to be laid with precision, and sometimes not,

3. A complaint having been made ore tenus by a solicitor, before the chancellor, in the court of chancery, of an arrest in returning home after the hearing of a cause, the indictment stated that " at and upon the hearing of the said complaint," the defendant deposed, &c.; this is a sufficient averment that the complaint was heard,

4. The complaint of the defendant being that he was taken before he got to his own house in the parish of St. Martin in the Fields, innuendo, his house, in the Hay market, in St. Martin's, &c. The innuendo is only a more particular description of the same house, and good 69, 70

was arrested upon the steps of his own door, an inmendo that it was the outer door, is good.

6. Where time is not material, it need not be positively averred, and if under a videlicet, may be rejected. ib. 70, 1

# PETITIONING CREDITOR'S DEBT.

See Bankrupt, Commission of, 2.

#### PEW.

1. Possession alone of a pew in a church, though for above 60 years, is not a sufficient title to maintain an action on the case, even against a wrong-doer for disturbance in the enjoyment of it, but the plaintiff must prove a prescriptive right, or a faculty; and should cla m it in his declaration, as appurtenant to a messuage in the parish. Stocks v Booth.

2. But possession for 36 years, where the pew is claimed as appurtenant to a messuage, is good presumptive evi-

dence of a faculty. Rogers v. Brooks er ux. M. 24 Geo. 3. B. R. P 431 n. 3. I'respass will not lie for entering into a pew, because the plaintiff has not the exclusive possession, the possession of the church being in the parson. Stocks c. Booth. See Faculty.

#### PLEADING.

1. In replying to a plea of infancy, the plaintiff must shew enough in his replication to maintain every part of the declaration. Trueman v. Hurst. 40 2. If a replication, which is entire, be bad as to part, it is bad as to the whole

3. A declaration, entitled generally of the term, relates to the first day of the term; and the promises and breach, being laid on the first day of the term, may be presumed to have been made before the delivery of the declaration; because by a reference to the ancient practice of declaring ore senus, the declaration cannot be supposed to have been delivered till the sitting of the court on that day. Philip v. Robin-

 Where two judgments referred to. the same day, it was held that the priority of one could not be av ried. Lord Porchester's Case. Tr. 23 Geo. 117, 118

5. The oath being that the defendant 15. The exceptions in the exacting clause of a statute, which creates an offence and gives a penalty, must be negatived by the plaintiff in his declaration; not so, where they are contained in a subsequent proviso. Spieres v. Parker.

> 6. In debt on the 19 Geo. 2. c. 30. for the penalty of 50/. for impressing a mariner in the West India trade, the declaration must aver that he had not deserted from any of his majesty's ships of war.

> 7. In an inferior court the declaration must allege that the money was had and received within the jurisdiction, as well as that the defendant promised to pay within it. Trevor v. Wall.

> 8. Where one count of a declaration in an inferior court is not laid within the jurisdiction of that court, and the damages are given generally, the objection is fatal upon a writ of error, although there is another good count. ib.

> > 9. A

9. A supersedeas obtained after judgment cannot be pleaded in bar to an action on such judgment Topping Ryan.

Topping Page 273

10. Where the same plea may be pleaded, and the same judgment given on two counts, they may be joined in the same declaration. Brown o Dixon.

11. Assumpsit and trover cannot be joined. ib. 277

But to a declaration against a common carrier, upon the custom of the realm, a count in trover may be added.

13. If a tenant from year to year hold for 4 or 5 years, either he or his landlord, at the expiration of that time, may declare on the demise, as having been made for such a number of years. Birch •, Wright. 380. Saik. 414. Legge •. Strudwick.

14. A plea by an heir at law, who was sued by an obligee of his ancestor, that he claimed to retain a certain sum for money laid out in repairing the premises, cannot be supported. Shettleworth • Neville.

15. Quere? Whether necessary repairs might be so pleaded? ib. 457

16. Quere? Whether not guilty may be pleaded to an action of debt on a penal statute? Coppin qui tam v. Carter.

17. Upon a devastavit against executors not guilty may be pleaded as well as nil debet.

18. Where a payee of a bill of exchange indorses it to A. and B. as executors, they may declare as such in an action against the acceptor. King and Others executors, &c v. Thom. The Same v. M'Linnan 487

19. A covenant in a charter party, " that no claim should be admitted, or allowance made for short tonnage, unless such short tonnage be found, and made to appear on her arrival on a survey to be taken by four shipwrights, to be indifferently chosen by both parties," is not a condition precedent to the plaintiff's right of recovering for short tonnage, but is a matter of defence to be taken advantage of by the defendant; and the not averring performance is no ground for arresting the judgment. Hotham v. The East India Company. 638

20. It a lessor covenant for quiet enjoyment against the lawful let, suit, en-

try. Ge. of himself, his heirs, and assigns, the declaration for a breach of the covenant need not expressly allege that he entered claiming title if the disturbance complained of be such as clearly appears to be an assertion of right. Lloyd v. Tomkies. Page 671 21. In covenant on a charter-party, by which it was agreed to employ a ship of which the plaintiff was the captor. as soon as sentence of condemnation should have passed; the sentence must be taken to mean a legal sentence; and the party suing for the freight must aver that the ship was condemned by a court having competent jurisdiction: Unwin v. Wolseley.

22. In a plea of judgment recovered on a simple contract, pleaded by an administrator to debt on bond, he must aver that such recovery was had before notice of the bond debt. Sawyer v. Mercer. 690

23. Where the defendant bound himself as administrator to abide by an award to be made touching matters in dispute between his intestate and another, and the arbitrators awarded that he, as administrator, should pay, &c. he cannot pleau plene administratoit to debt on the bond; for by submitting to the award he has admitted assets.

Barry v. Rush.

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24. After a rule to abide by a special

plea, or plead such other plea as the defendant will abide by, he can only plead the general issue. Hare v. Lloyd 693
25. After such a rule the defendant may plead the general issue, and give notice of set off. Cochean a Robert

may plead the general issue, and give notice of set off. Cochran v Robertson, M. 20 Geo. 3. 693, n. See Costs, 9. Infant, 5. Oper. Practice.

POLICY.

See Innurance.

POOR.

See Overseers.

## POOR-RATE.

1. Lands purchased by a company, and converted into a dock according to an act of parliament, which declares that the shares of the proprietors shall be considered as personal property, are rateable to the poor in proportion to the annual profits. The King v. The Dock Company of Hull.

2. The ranger of a royal park is rate-

The ranger of a royal park is rateable as such to the poor for enclosed lands

lands in the park yielding certain profits. Lord Bute v. Grindall. Page 338 3. But he is not rateable for the herbage and pannage, which yield no profits.

4. The occupier of land is rateable, and it is immaterial by what tenure he holds it.

5. If the name of any person be omitted in a rate made for the relief of the poor, the justices ought to quash the rate, and not amend it by adding his name. The King v. The Churchwardens, &c. of Maddern.

 Notice of an appeal against a poor rate must be given to the churchwardens or overseers of the parish making the rate.

7. But it is not necessary for the appel lant to give notice to the person whose name is omitted in the rate. ib.

8. Personal property, if visible, and yielding a certain annual permanent profit, is rateable to the poor. The King v. Hogg. 727

So that a house and engine for carding cotton, which are rented as one entire subject, and described by the general name of an engine-house, may be rated.

10. So may the profits of a weighing machine-house, The King v. St. Nicholas, Gloucester. 723, n. a.

# POSSESSION.

See Pew, 1.

#### POUND-KEEPER.

x, A pound-keeper is bound to receive every thing offered to his custody, and is not answerable whether the thing were legally impounded or not. Brandling v. Kent.

POWER.

1. Under a power of appointing a real estate to the use of such child and children, &c. and where in default of appointment the estate was settled "to the use of all and every the child and children;" an exclusive appointment to one is good. Swift dem. Huntley and ux. v. Gregson.

2. Under a power of appointing real and personal estate "to and amongst such of the testator's relations as shail be living at the time of his death in such parts, shares and proportions, &c." an exclusive appointment to one is good. Spring dem. Titcher v. Biles and Another, M. 24 G. 3. B. R.

435, n.

3. A lease made under a special power by a tenant for life for a longer term than his own life, is void on his death. unless the power be strictly pursued. Doe dem. Ellis v Sandham. P. 705

Doe dem. Ellis v Sandham. P. 705
4. So that under a power to a tenant
for life to lease for years, reserving the
usual covenants, &c. a lease made by
him, containing a proviso that in case
the premises were blown down or
burned, the lessor should rebuild,
otherwise the rent should cease, is
void; the jury finding that such covenant is unusual. Doe dem. Ellis v.
Sandham.

### PRACTICE.

r. The defendant is bound to search in the office, whether the plaintiff has brought in the issue roll on the same day that he signs judgment of non pros, even though he may have searched on another day on the expiration of the rule to bring in the roll. Minns v Baxter.

2. Proceedings set aside because the bill of Middlesex was served in the city of London, Borman v. Bellamy. 187

3. The declaration need not be delivered to a prisoner personally, or to the gaoler, unless where he is in custody at the suit of the same plaintiff for the same cause of action. Robertson v. Douglas.

4. Service of a latitat at eight o'clock in the evening of that day when it is returnable is good, though the declaration be left in the office in the course of the same day.

5. So in the case of Ward and Wilkinson, the court refused to set aside the proceedings, though the notice of declaration was not served till half after ten at night.

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6. The plaintiff must give notice of his having abandoned a former committi-tur, which is erroneous, before he enters a second rectifying the mistake. Topping v. Ryan. 227

7. When a defendant who has been convicted on an indictment comes up to receive judgment, the prosecutor may read affidavits in aggravation, though made by witnesses who were examined at the trial, which affidavita the defendant is at liberty to answer. The King v. Sharpness.

8. The four days allowed for pleading in abatement are both inclusive. Jennings v. Webb. 227

9. Every

9. Every plea in abatement must be pleaded before the rule for pleading is out, and cannot be pleaded after an imparlance, unless the declaration is delivered so late in term, that the defendant is not bound to plead to it in that term: or is delivered after term: in both which cases the defendant may within the four days inclusive of the subsequent term plead any plea in abatement as of the precedent term; and Sunday is one. Page 278 10. Bail in error must be put in within four days after final judgment signed, without reference to the time of the allowance, or serving the copy of it. The service of the allowance is only to bring the party into contempt if he proceeds; for the allowance is of itself a supersedeas. Jaques v. Nixon. 11. If a writ of error be sued out before judgment is signed, which is frequently the case, and the plaintiff will not sign judgment till after the return of the writ in order to avoid the effect of it, and then sues out execution, the court will set aside the execution. ib. 12. The general rule respecting signing . judgments for non-appearance is that, where by the writ each party has a day in court, and the defendant may be damnified by not appearing, he may appear and demand the plaintiff; and if the plaintiff does not appear, the defendant is entitled to sign judgment, and to have his costs; and this even though the writ be not returned, as upon a capias, exigent, or distringas. Davies v. James. 373 13. Judgment may be signed for want of a plea at any time after twenty-four hours from the time of the plea demanded. Dyche v. Burgoyne. 14 Not guilty pleaded to an action of debt on a penal statute is not such a nullity as warrants judgment to be signed for want of a plea. Coppin qui tam v. Carter. 462 15. The plaintiff after judgment and a writ of error allowed, having become a bankrupt, his assignees cannot sue out a scire facias in their own names to compel an assignment of errors till some judgment be given, and then it

must be done immediately after such

judgment: but they should have gone

on with the writ of error in the bank-

rupt's name till judgment. Kretch-

16. Assignees of a bankrupt cannot

man v. Beyer, in Error.

make themselves partners to the record in an action commenced, &c. by the bankrupt, in any intermediate stage of the proceeding; but it must be im-mediately after judgment though an interlocutory judgment is sufficient for that purpose. Page 463 17. Defendant, discharged out of the custody of the marshal, because there was no acknowledgment by him of the defendant's being in custody in the term in which he was charged in execution. Fisher v. Stanhope. 464 18. Judgment as in case of a non-suit cannot be entered on the plaintiff's neglecting to carry the record down to trial where the defendant might have carried it down by proviso. King v. Pippett. 19 A rule issued in the vacation, though tested in term time, requiring a sheriff to return a writ, is irregular; and an attachment for disobeying it will be set aside by the court on motion. The King v. the Sheriti of Cornwall. 552 20. The rule, that a prisoner who is once supersedeable always continues so, only holds so long as he remains in the same custody, and under the same process. Rose v. Christfield, 591. and the London Assurance Company v. Perkins. 591. n. ₄. 21. So that if a prisoner on mesne process were supersedeable for any irregularity he cannot take advantage of that after he is charged in execution, if he had any opportunity of applying on that ground before he was charged in execution. 22. As the bail in error cannot surrender the principal, they are not entitled to relief, though the principal become a bankrupt pending the writ of error. Southcote v. Braithwaite. 23. The plaintiff is entitled to all the costs till the time of the defendant's paying money into court, notwithstanding he afterwards proceeds in Hartley v. Bateson, 629. the action. Griffiths v. Williams. 24. A demand of a plea before the defendant has appeared, or the plaintiff filed common bail for him, is a nullity. Cook v. Raven. 635 25. Where an action is brought on a

affirmed,

judgment recovered in this court, and

after judgment the defendant brings a

writ of error, and obtains a rule to

stay proceedings in the mean time, and the plaintiff dies before judgment

judgment to be entered nune pro tune. Pase 637 Bates v. Lockwood.

26. But if the action be brought on a judgment recovered in the common pleas, the court will not stay proceedings pending a writ of error without the defendant's giving judgment in the second action.

27. Where a corporation is plaintiff in a civil action, leave to inspect their books is granted to the defendant of The Mayor, &c. of Lynn v. Denton.

28. The plaintiff may sign judgment if the defendant plead in abatement after the four days, though no rule to plead has been regularly served. Brandon 🖦 Payne.

29. After a rule to abide by a special plea, or plead such other plea as the defendant will abide by, he can only plead the general issue. Hare v.

Lloyd, 693. Prout v. Dewar. ib. 30. But after such a rule the defendant may plead the general issue and give notice of set off. Cochran v. Robert-693, n.

31. Where the defendant carries down the record by proviso, it is sufficient if he obtain the usual rule for trial by proviso any time before trial, even though it be obtained after he has given the plaintiff notice of trial. King

v. Pippett. 32. Paying money, into court, where the demand is for unliquidated damages, by a judge's order, after plea pleaded, is irregular : but if the plaintiff take the money out, he thereby waves the irregularity, and cannot afterwards have a verdict unless he recover more than the sum paid in. Griffiths v. Williams. 710

See Further as to Practice; Costs, Plead-PRESUMPTION.

1. The circumstance of twenty years having elapsed without any demand made, is of itself a presumption that a bond has been paid. Oswald v.

2. Satisfaction of a bond may be presumed within a less period, if any evidence be given in aid of the presumption, as if an account between the parties has been settled in the intermediate time, without any notice having been taken of such a demand.

affirmed, the court will not permit; 3. But in either case it is only a ground on which the jury may presume satisfaction; and is in itself no legal bar. Hage 270

4. If a person, claiming a toll for passing over an highway can shew that the liberty of passing over the soil, and the taking of toll for such passage, are both immemorial, and that the soil and the tolls were before the time of legal memory in the same hands, though severed since, it will be presumed that the soil was originally granted to the public in consideration of the tolls; and such original grant is a good consideration to support the demand. Ld. Pelham v. Pickersgill.

See Verdict.

PRIORITY. See Execution, 3, 4, 5, 6. Pleading, 4.

# PRISONER.

1. The rule, that a prisoner, who is once supersedeable always continues so, only holds so long as he remains in the same costody, and under the same process. Rose v. Christfield. 591

2. So that if a prisoner on mesne process were supersedeable for any irregularity, he cannot take advantage of that after he is charged in execution. if he had any opportunity of applying on that ground before he was charged in execution.

3. The rule, which requires that an attorney on the part of a prisoner should be present when a boud and warrant of attorney are executed by him, only relates to persons in custody on mesne process. Birch v. Sharland. See Judgment. 4.

#### PRIZE-MONEY.

1. Qu. Whether an officer under arrest and suspension on board the fleet for an offence of which he is afterwards acquitted, is entitled to prize-money taken dur ng such arrest and suspension? Johnstone v. Sutton in Error, Exch. Ch. 493

#### PROBABLE CAUSE.

 Whether such and such facts proved amount to a probable cause or not is a question of law. Johnstone v. Sutton in Error, Exch. Ch. 545. Candell v. London.

PROFERT.

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## PROHIBITION.

1. Where a made is pleaded in an ecclesiastical court, a prohibition may be granted any time before final sentence.

Darby v. Cosens.

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2. A prohibition will be gramed to a court of appeal, where it appears that they have no jurisdiction over the subject matter, even after they have remitted the suit to the court below, and awarded costs against the appellant, and though the party applying for a prohibition appealed to that

3. A prohibition issued to the bishop of Chichester, who claimed a right to present by lapse, under pretence of his visitatorial authority, to the office of a canon residentiary of his church, it being a freehold office, and the right of election thereto in the dean and chapter. The Bishop of Chichester v. Harward and Another.

4. Whether, in case the dean and chapter neglect or refuse to appoint a canon residentiary in proper time, the bishop by virtue of his general visitatorial power may appoint protempore, till such election be had. Quart?

See Modus, 1.

# PROMISSORY NOTES.

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1. Judgment as in case of a nonsuit cannot be entered on the plaintif's neglecting to carry the record down to trial; where the defendant might have carried it down by proviso. King o. Pippett.

2. Where the defendant carries down the record by proviso it is sufficient if he obtain the usual rule for trial, even though it be obtained after he has given the plaintiff notice of trial. King Pippett.

#### PROXY.

See Chichester Church, 6:

#### PURCHASE.

1. Taking a grant of a copyhold with 1s. fine, 1s. herior, and 1s. rent, is a purchase within 9 Geo. 1. s. 7. s. 5. The King v. Warblington. 241. See Devise.

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# QUARTER SESSIONS.

1. Whether when the sessions state facts fully and particularly, from which they infer fraud; the court of B. R can draw their own conclusion from those facts, without regard to the adjudication of the sessions. Quarte? The King v. The Inhabitants of Woodlands. Page 951
2. An appeal against a conviction on

the 24 Geo. 3. c. 21. for not entering horses; &c. must be to the quarter sessions next after the conviction, and not after the execution. Prosect v. Hyde.

3. The court of B. R. ordered the sessions to enquire into a fact; which appeared doubtful on the original order of removal, even though the sessions stated no case for the opinion of the court. The King w. Margam. 773 See Appeal. Order of Removal.

### QUO WARRANTO INFORMA-TIONS.

 These are no longer granted of course; but the court will consider all the circumstances of the case before they disturb the peace of corporations.
 The King v. Stacey.

2. The court will not grant an information in the nature of a quo warranto after 20 years quiet possession.

3. But even after 20 years quiet possession, the king may prosecute by his attorney-general. ib. 3

4 Length of time, though less than 20 years; may induce the court to refuse such an information under certain circumstances. ib. 3

5. Fourteen years quiet possession held a sufficient length of time for refusing an information. The King v. Pike and Braddock. T. 20 Geo. 2. n. 2. ib.

6. 2. W. information against a freeman of the borough of Winchelses refused after 16 years acquiescence under the election of a mayor, (under which the defendant claimed.) where a mere blunder was committed, as to the person who ought to have presi-

ded thereat in the absence of the old | wages for the time which elapsed premayor, whose duty it was. The corporation consists of a mayor, jurats, and freemen: and the election of mayor is made annually by the body of freemen out of the jurats, which latter have no right to vote; and on that occasion the election appeared to have been held before the new mayor himself instead of the oldest freeman. But all parties had concurred at the The King v Stacey. ib P. 1 7. Whether the court will grant an information to impeach a derivative title where the person from whom it was derived died in the undisturbed possession of it. Quere? The King 8. Such title shall not be impeached by those who have acquiesced and acted ib. 4

9. After the death of a mayor, Blackstone, J. would not suffer his eligibility to be disputed, but merely the fact, whether he was mayor or not, which the corporation books shewed; and if he was in fact mayor, it was to be taken that he had been regularly so. The King v. Spearing. Spring ass at Winchester, 1771. ib 4 10. Where any one of several issues in

a quo warranto information is found for the prosecutor, on which judgment of outer is given, he is entitled to costs on all the issues. The King v. Downes.

11. Acceptance of charters, and their validity: and pleadings in quo warranto informations. See the King v. 575 Amery.

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#### RANSOM BILL.

1. In the case of a ransom bill, the owners are not liable beyond the value of the ship and cargo. Helly & Grant. T. 23 Geo S. cited in Yales v. Hall

2. But a promise by a captain of a ship, on behalf of his owners, when the ship was taken, to pay monthly wages to one of his sailors, in order to induce him to become a hostage, is binding on the owners, although they Yales abandon the ship and cargo. v. Hall.

2. Quere? Whether after a capture and ransom, the owner is liable to pay

vious to the capture? See Ship, 2, 3.

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See Poor Rate.

RECOGNIZANCE. See Certiorari, 1. oz Costs, 5.

#### RECORD.

1. A bill of Middlesex filed of record. as of the 24 Geo. 3. when it ought to have been of the 25th, may be amended agreeable to the truth. Green v. Rennet.

2. The principal circumstance which guides the discretion of the court in applications to amend any of their records, or other proceedings, is that there is something to amend by.

RECORDARI facias loquelam. See Gusts, 13.

RECOVERY. See Remainder.

See Lecturer.

# REMAINDÈR.

RECTOR.

1. A. tenant for years, remainder to B. for life, remainder to the first and other sons of B. in tail, remainder to B. in tail; A. and B. join a lease and release to make a tenant to the precipe, and suffer a recovery; the estate tail limited to the sons of B. is not devested by the recovery, nor is there any forfeiture of the respective estates of A. and B. Smith dem. 738 Richards v. Clyfford.

2. By such recovery B. only barred his remainder in tail, subsequent to the remainder in tail to his first and other sons.

See Devises 3.

REMOVAL. See Order of Removal.

RENEWALS OF LEASES. See Fines. Bonds.

## RENT.

1. Bankruptcy is a plea to an action of debt on the reddendum in a 91 Wadham v. Marlowe. 2. Whether

2. Whether bankruptcy is a plea to an action of covenant for rent. Quere? Ludford v. Barber. Page 86 See Bonds. Distress. Evidence, 3. Landlord and Tenant, 1.

#### REPAIRS.

1. When not pleadable by an heir to debt on bond.

See Pleadings, 14, 15.

REPLICATIONS. See Pleadings, 1, 2.

REVERSION. See Devise, 1. Remainder.

ROBBERY.

See Carriers, 1, 2.

#### RULE.

1. A rule issued in the vacation, though tested in term time, requiring a sheriff to return a writ, is irregular; and an attachment against him for disobeying it will be set aside by the court on motion. The King v. The Sheriff of Cornwall.

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#### SCIRE FACIAS.

Scire Facias to revive a judgment, entered on a bond securing an annuity, granted before the 17 Geo. 3. c. 26. s. 2. commanding that no action shall be brought on any judgment already entered, (unless certain requisites were complied with, is an action within that clause. Fenner v. Evans.

2. A scire facias to revive a former judgment is so far a continuation of the same action, that if the plaintiff's testator had agreed not to bring a writ of error in that former action; such agreement shall bind his executors upon the scire facias being brought against them Executors of Wright v. Nutt in Error.

See Bankrupt Assignees of.

SCOTLAND.

See Game, 1. University.

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See Judgment, 4.

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## SERJEANTS AT LAW.

Appointed, Page 147, 268, 551.

#### SERVANT.

See Government. Master and Servant. Settlement by biring and Service. Stander.

#### SESSIONS.

See Quarter Sessions.

#### SET-OFF.

1. A broker with a commission deleredere cannot prove under a notice of set-off a loss upon a policy, happening before a bankruptcy, in an action by the assignees of the bankrupt, for premiums upon policies under-written by him, and for which he had debited the broker: but such a loss may be set-off under the general issue. Grove v. Dubois.

2. After a rule to abide by a special plea, or plead such other plea as the defendant will abide by, he may plead defendant will abide by, he may plead set-off. Cochran v. Robertson. M. 20 Geo. 3. 693, n.

3. Where a prisoner in execution is discharged by the consent of his creditor, upon giving a fresh security to satisfy the judgment; and that security is afterwards set aside on account of a mere informality the judgment is satisfied; and cannot be set off against a demand of the prisoner. Jacques v. Withy.

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# SETTLEMENT.

See Quarter Sessions. Order of removal.

- By Apprenticesbip.

1. Where there has been such an agreement between the master and the apprentice to give up the indentures, as that to an action of covenant brought by the former, the latter could plead the matter in bar; or so as to enable the apprentice to bring trover or detinue for the indentures on the master's refusing to deliver them up; the indentures are considered as cancelled, for the purpose of enabling the apprentice to gain a settlement by hiring and service, though the indentures still subsist in fact. The King v. Harberton.

2. But when indentures of apprenticeship still subsist in point of law, and 3. An apprentice cannot gain a settlement in a different parish by serving another master, unless there be an express consent of the original master to the particular service: a mere recommendation is not sufficient. ib.

4. The latter part of the service of an apprentice may be joined to the former, notwithstanding any intervening service, ib.

# SETTLEMENT By Certificate.

1. A second certificate to a pauper discharges a former one given by the same parish The King v. St. Peter, Derby. 218

2. If a parish are desireus to get rid of a certificate, it is incumbent on them to shew clearly some matter in discharge thereof; and the court will not presume such discharge from other facts. The King v. Warblington.

3. A certificated man may gain a settlement by residing 40 days on his own estate. ib. The King v. Cold Ashton Bur See Ca. 450

4. A voluntary gift of an estate, although under the value of 301, and 40 days residence thereon, will give a settlement to a certificated man is. 241

5. A certificate given to a psuper is an indemnity to the parish, to which the pauper is going, from the consequences of permitting him re reside there.

The King v. Newington 356

6. A temporary absence for a particular purpose will not discharge a certificate, ib.

7. But if the pauper quit the parish, to which the certificate is given, without any intention of returning, the certificate is at an end.

ib.

8. An order of removal, adjudging that the pauper was settled at A. by surme of a certificate, was confirmed at the sessions on the merits; on its being stated by the sessions according to disciple the court, that the certificate was not signed by a majority of the churchwardens and overseers of A. This court quashed the orders. The King e. Margam.

SETTLEMENT. By Betate.

Taking a grant of a copyhold with
 Is. five, 12. heriot, and 12. rest, is a purchase within 9 Geo. 1 c. 7. s. 5.
 The King v. Warblington. Page 241
 A voluntary gift of an estate, though under the value of 30. will give a sertlement, whether the douce the acertificated man or not.

- By Hiring and Service.

1 Where the master insisted on turning away his servant, and threw down his wages, which the other tool up, and then went away, and after the expiration of six days returned at the master's request, and served the remainder of the year, the absence was not purged by the subsequent return. The King v. Gresham.

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2 Absence can only be purged where the act itself is doubtful

3 Hiring and service from the day after old Martinmas day, until the old Martinmas day following is sufficient to give a settlement. The King o. Skiplam.

4. No settlement is gained by a hiring and service for less than a year, though the master tell the servant at the time of the hiring, that he shall not belong to the parish, and the sessions state such contracts to be fraudulent. The King v. Mursley. 694

5. If a servant be hired from November to Michaelmae following, and before Michaelmae alay his master offer to hire him from Michaelmae for a year at certain wages, to which he does not agree, but remains in the house till the second day after Michaelmae, working as usual, and then accepts the offer, and serves a part of the year; the service under the latter hiring, commences on the Michaelmae-day, and may be coupled with the former service, so as to give a settlement. The King v. Sulgrave.

See Sattlement by Apprenticeship, 1, 2, 3, 4.

By Marriage.

1. Bastards are within the meaning of the marriage act, 26 Geo. S. c. 33, which requires the consent of the father, guardian, or mother, to the marriage of persons under age, who are not married by banns. The King v. Hodnett.

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SETTLEMENT.

SETTLEMENT. By taking a tenement of 10! a year.

1. A cartegate is a tenement within the 13 and 14 Car. 2. c. 12. so as to enable the occupier of it to gain'a settlement. The King v. Whixley Fage 137

2. It is not necessary that money should be paid by way of rent for a tenement under the 13 and 14 Car. 2. c. 12. Repairing gates is equivalent to sent.

3. A fraudulent renting of 10/, per ansum, will not give a settlement. The King v. Woodlands 261

4. Where the pauper rented a mead a for ten guineas a year, and did on stock it, but let the grass for the first half year to A. B. for three guineas who stocked it, and paid him, and then the pauper paid his landlord half a year's rent, and then let the mowing of his meadow to his landlord five guineas, and the after-grass for two guineas, and at the end of the year received two guineas from his landlord on the balance of accounts; the sessions adjudged this a fraudulent taking, which the court confirmed.

5. Where the pasper rented the fisher, of a pond, with the spear-sedge, flags, and rushes, growing in and about the same, for 101. a year, "the court understood that the soil passed with it, and that it was a tenement within the statute 9 & 10 W. 3. c. 11."

The King v. Old Alresford.

6. The fact of the pauper's taking a temement of 10l. a year is sufficient to give a settlement though the lessor may have no title.
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7. Where a pauper rented a tenement of 81. a year in 1. and held another af 21. 10s per annum in 18. under a parol demise from his brother so bold as long as the brother pleased, and to be taken by him again when he pleased, and was to pay nothing for it, this was held a sufficient taking of a tenement of 101, per annum under the 13 and 14 Car. 2. c 12. for the purpose of giving the pauper a settlement. The King v. Fillongley.

8. The criterion by which the court form their judgment is not the ability of the party coming to reside on a tenement of 10. a year; for if a person be trusted with a tenement of that value, even out of charity, that is sufficient.

# SHERIFF, BAILIFF, &c.

1. An agreement in writing to put in go d bail for a person arrested on mesme process, at the return of the writ, r surrender the body, or pay debt and costs, made by a third person with the bailiff of the sheriff in consideration of his discharging the party arrested is void by 23 H. 6. c. 10. Rogers v. Reeves

2. The security in such cases must be in the particular form marked out by the statute, otherwise it is void, and he statute requires the bond to be give to the sheriff as such, for the speurance of the party, and for no other purpose.

ib. 421, 2.

3 The obligation being given to the seriff's balliff is bad: for it must be to such officer as has the return of process.

4. Trespass will not lie by the assignees of a bankrupt against a sheriff for taking the bankrupt's goods in execution after an act of bankruptcy, and before the issuing of the commission, notwithstanding he sells them after the issuing of the commission, and after a provisional assignment, and notice from the provisional assignee not to sell. Smith and Another assignees of Clarke v. Milles.

5. The sheriff or his officers shall not be trespassers by relation, if the first taking were lawful. ib. 480, 1.

6. Where two writs of fieri facias against the same defendant are delivered to a sheriff on different days, and no sale is actually made of the defendant's goods, the first execution must have the priority, even though the seizure were first made under the subsequent execution; and if the person claiming under the second execution pay the sheriff the amount of the debt under the first execution for his security, the court will not compel the sheriff to retund that money on motion. Hutchinson v. Johnstone. 739

7. But where the sheriff had given a bill of sale to the person claiming under the second execution, that was held to bind the sheriff. Rybot •. Peckham M. 19 G. 3. Page 731, n. See Attorney, 2.

#### SHIP.

1. The owner of a ship is not liable beyond the value of the ship and freight, under 7 Geo 2.c 15. a. 1. in the case of a robbery in which one of the mariners is concerned, by giving intelligence and afterwards sharing the spoil. Sutton v. Mitchell. 18

2. A promise by a captain of a ship on behalf of his owners, when the ship was taken, to pay monthly wages to one of the sailors in order to induce him to become a hostage, is binding on the owners, although they abandon the ship and cargo. Yates v. Hall.

3. Qu. Whether, after a capture and ransom, the owner is liable to pay wages for the time which elapsed previous to the capture? ib. 79 See Bill of lading, 1, 2. Contract, 1, 2, 3. Ransom Bill, 1.

#### SISTER.

See Custom, 1.

#### SLANDER.

1. A servant cannot maintain an action against his former master for words spoken, or a letter written by him in giving a character of the servant, unless the latter prove the malice as well as falsehood of the charge; even though the master make specific charges of fraud. Weatherstone v. Hawkins.

 There may be an implied justification of a libel, or of slander, from the occasion, (as if read in a judicial proceeding) as well as on account of the subject matter.

See Libel.

# SMUGGLING.

1. By 24 Geo. 3. c. 47. and the excise laws, the forfeiture of a vessel attaches the moment an act of smuggling is done, so as to avoid mesne incumbrances or alienations between that time and the time of condemnation. Lockyer and Others v. Offley.

2. But the crown is not entitled to the 23 H. 6. c. 10.

intermediate earnings of the vessel.

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3. Neither is the actual property of the vessel altered till after the seizure, though it may be before condemnation.

4. Custom-house officers may seize for the forfeiture within three years after the fact committed; and the attorney-general may file an information at any time whilst the ship is in being.

ib. 261

SOUTH SEA COMPANY.
See Governant, 2.

SPECIFICATION. See Letters Patent, 2, 3, 4.

#### STAMPS.

1. An unstamped agreement to sell a share of a ticket in a lottery, before the tickets are deposited with the commissioners, is within the penalty inflicted by the 21 sec. of 22 Geo. 3. c. 47. The King v. Hawksworth.

See Lease, 6, 7.

#### STATUTES.

1. The exceptions in the enacting clause of a statute, which creates an offence and gives a penalty, must be negatived by the plaintiff in his declaration. Spieres v. Parker. 161

2. Not so where they are contained in a subsequent proviso.

3. Nor if they are contained in a subsequent statute, in which case the defendant must shew by way of defence, that he comes within such exceptions. The King v. S. Hall.

4. And where a prosecutor in his information negatives some of the exceptions which he need not, they may be rejected as surplusage.

5. Where the words of a statute are doubtful, general usage may be called in to explain them: but where they are clear, the usage of a particular place cannot control them. The King v. Hogg.

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9 An. c. 25. 44	of itself a supersedeas; and the ser-
10 An. c. 14. 28	of itself a supersedeas; and the ser- vice of it is only to bring the party in-
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3. The rule, that a prisoner, who is, once supersedeable, always continues so, only holds so long as he remains in the same custody and under the same process. Rose v. Christineld. Page 591 . So that if a prisoner on mesne process were supersedeable for any arregularity, he cannot take advantage of that after he is charged in execution, if he had any opportunity of applying on that ground before he was charged in execution.

#### SURETY.

1. Where S. L. was arrested for the amount of goods, and E. L. in order to procure his discharge, became bound, as surety with him, in a bond to the plaintiff, payable by installments, and before the first default E L. became a bankrupt, the plaintiff is bound to prove his debt under the commission, by virtue of 7 Geo. 1.c. 31. for the credit was given to both. Brooks and Another v. S. and E.

2. A surety who does not pay the debt of the principal till after his bankruptcy, though called upon and liable to pay it before, may hold the principal to bail, notwithstanding his certificate. 599 Paul v. Jones.

#### SURPLUSAGE.

1. Where an informer need not negative any of the exceptions in a statute, and negatives some of them only, that part of the information may be rejected as surplusage. The King v. S. Hall.

## SURRENDER.

1. A surrender of chambers in New Inn, to the treasurer and antients of the society, made with their assent, to the intent that they may grant the said chambers to a purchaser, passes the estate to such purchaser before aumission; for admission in this case is not necessary, as in the case of copyholds, to complete the grantee's estate, but is only for the purpose of signifying the assent of the society, that the grantee should become a member of the Inn. And therefore, upon the death of the surrenderee, before acmission, the society may maintai ejectment for them. Doe dem. Warry and others w. Miller and Another Ex ecutors, じc.

2. The title to copyhold lands, relates | See Pleading, 3.

back from the time of the admittance to the surrender as against all persons but the lord; so that the surrenderee may recover in ejectment against the surrenderor on a demise laid between the times of surrender and admit-Holdfast dem. tance. Wollams w. Clapham. Page 600

3. Whether the surrendesse before admittance can recover against the lord, Quare? ib. or a stranger.

4 The surrenderor before admittance onsidered as a trustee for the surrenderee; and as between them admittance is not necessary to maintain ejectment.

See Agreement, 3.

SURRENDER of a LEASE. See Lease, 3.

SWINDLER. Sea Justification.

T.

TENANT.

See Notice.

TENANT from YEAR to YEAR. 1. We ere liable for use and occupation after he is evicted. Set Use and Oc-

cupition, 1.

2 Tenant from year to year pefore a mortgage or grant of the reversion is entitled to six months notice to quit before the end of the year, from the mortgagee or grantee. Burch Wright

3. If a tenant from year to year hold for four or five years, either he or his landlord at the expiration of that time may declare on the demise as having been made for such a number of years, ib. & 363

TENANT FOR LIFE See Trover, 1. Warte Forfeiture, 3.

TENANT IN TAIL Waste. Forfeiture, 3. See Trover, 1.

TENANT IN COMMON. See Ejectment, 9.

TERMS IN CONVEYANCING. Sec Ejectment Lease, 2, S.

TERM.

TIME.

### TIME.

Bee Presumption.

#### TOLLS.

- 1. A general indebitatus assumpsit will lie for tolls. Seward v. Baker.
- Page 616 2. If a person claiming a toll for passing over an highway, can shew that the liberty of passing over the soil, and the taking of toll for such passage, are both immemorial, and that the soil and the tolls were before the have of legal memory in the same hands, though severed since; it will be presumed that the soil was originally granted to the public in consideration of the tolls; and such original grant is a good consideration to support the demand. Lord Pelham v. Pickersgill. 660

TOTAL LOSS. See Abandonment, 1, 2, 3, 6.

#### TOWNSHIP.

1. Wherever there is a constable, there there is a township. The King v. Sir Watts Horton.

374
See Overseers.

#### TRADE.

- 1. How far trading with an enemy is illegal in a subject, Quere? Gist v. Mason. 84
- 2. By the maritime law it is cause of confiscation in a subject, provided he is taken in the act, but it does not extend to a neutral vessel.

  ib.

S. Trade is not transmissible; but is put an end to by the death of the trader. Barker • Parker. 295

4. If executors carry on trade, they must do it as individuals unless they carry it on under the direction of the court of Chancery.

5. Acts of parliament relating to trade in general are public acts; but an act which relates to a certain trade only is a private one. Kirk and Others v. Nowell.

See Bond 4, 5, 6. Insurance, 7.

#### TRESPASS.

- 1. Trespass lies and not case for working an estray, although the original taking be admitted to be lawful.

  Oxley v. Watts. 12
- 2. A person may justify a trespass in | English county following a fox with hounds over the of venire runs.

grounds of another; if he does no more than is necessary to kill the fox. Gundry v. Feltham. Page 344

3. Trespass will not lie for entering into a pew, because the plaintiff has not the exclusive possession, the possession of the church being in the parson. Stocks v. Booth.

A. Trespass will not lie by the assignees of a bankrupt against the sheriff for taking the goods of a bankrupt in execution after an act of bankruptcy, and before the issuing of the commission; notwithstanding he sells them after the issuing of the commission, and after a provisional assignment and notice from the provisional assignees may bring trover Smith and Another assignees of Clarkev. Milles.

5. To entitle a man to bring trespass, he must, at the time when the act was done, which constitutes the trespass, either have the actual possession in him of the thing, which is the object of the trespass; or else he must have a constructive possession in respect of the right being actually vested in him; as in the case of an estray or wreck before seizure by the lord. ib. 480 6. An executor's right is derived from

the will; the probate is only evidence of it; therefore he has a constructive possession from the testator's death.

7. Officers doing their duty shall not be trespassers by relation. ib. 480, 18. Trespass does not lie against excise officers who enter into a person's house by virtue of a legal warrant to search for smuggled goods, although none such be found therein. But ease lies for maliciously obtaining or executing the warrant. Cooper and Another w. Boot in Error. 535. See Gosts, 19. False imprisonment.

# TRIAL.

New Assignment.

- 1. The granting of a trial at bar is in the discretion of the court, and must depend upon the particular circumstances of the case. The King v. Amery.
- Where a fair trial cannot be had in the county where the matter arises, the trial will be awarded in the next English county where the king's writ of venire runs.

3. Therefore

 Therefore where the action arose in the city of Chester, and a fair trial could not be had there, the wenire was awarded into the county of Salop.

Page 363

## TRIAL NEW.

1. Not granted to give the defendant an opportunity of proving the illegality of a policy, which was not illegal on the face of it; for he should have shewn it on the trial. Gist v. Mason.

2. The court may in any case grant a new trial upon the ground of excessive damages. Ducker v. Wood. 277
3. An objection to the competency of witnesses, discovered after a trial, is not a sufficient ground of itself for granting a new trial; but it may have some weight with the court where the party applying appears to have merits. Turner v. Pearte. 717

TRIAL BY PROVISO. See Proviso.

#### TRINITY-HOUSE.

1. A younger brother of the corporation of the Trinity House is not exempt from serving the office of headborough or constable. The King v. T Clarke. 679

# TROVER.

1. An action of trover cannot be maintained by a tenant in tail, expectant on the determination of an estate for life, without impeachment of waste, for timber which grew upon and was severed from the estate. Pyne v. Dor.

2. Trover must be founded in the property of the plaintiff.

assignces of a bankrupt against a sheriff, for taking the goods of the bankrupt in execution, after an act of bankruptcy, though before the issuing of the commission, where he sells them after the issuing of the commission, &c. and has notice from the provisional assignce not to sell. Smith and Another assignces of Clarke v. Miller.

4. A member of an amicable society, intrusted with a box containing the fund, and bound by bond to keep it sately, cannot maintain evore against another member and a third person,

who take it from him. Holliday v. Camsell. Page 658

TRUST.

See Ejectment.

### TRUSTEES.

1. A clause in a marriage settlement, " that the trustees should not be chargeable with, or accountable for, any money arising in execution of the said trusts, but what the person or persons so to be accountable should actually receive, "does not bind the trustees generally as a covenant, but is a clause of indemnity to take away that responsibility which each would otherwise be subject to for the acts of the others; and only leaves each of them accountable for what he actually receives, as for a simple contract debt. Bartlett v. Hodgson. See Ejectment.

v.

# VARIANCE.

1. In an action for bribery at an election, where the declaration set forth the precept from the sheriff to the portreeve of a borough, the improper insertion of the word "if," in such precept, viz. "and if the said election so made," &c. is not a fatal variance, but is to be rejected as surplusage. King v. Pippett.

2. In an action against the sheriff for taking goods without levying a year's rent, the plaintiff undertaking to set forth the particulars of the demise (which was unnecessary) and not proving them as laid, must be nonsuited. Bristow v. Wright. (Dougl. 642.)

236

3. Undertood for understood in an indictment for perjury held an immaterial variance. The King v. Beach. (Cowp. 229.) ib. 237

4. An indictment for an assault had these words, "whereby his life was greatly despaired of," an indictment for perjury committed on that trial, setting forth the former indictment, omitted the words "despaired" which was supplied by the court. The King v. May, (Dougl. 183) ib. 237

5. The record in an action for false imprisonment set forth a few of the first words in a bill of Middlesex, and then added an Gc. the Gc. was held

by Lee Ch. J. to be no variance from the bill of Middlesex when read at the Wilson v. Mawson. Sittings after Mich. 13 Geo. 3. at Westmin-Page 237

6. In an action by the bailiff of Westminster against the defendant, in the nature of an escape, the declaration stated a latitat against Donner and J. Doe, with an ac etiam against Donner for 30%. The writ produced in evidence was against Donner and two others, and not against J. Doe. Lord Mansfield held this to be good, it being a sufficient writ to warrant Hendray v. Spencer. the arrest. Sittings after Michaelmas 1773, at ib. 238 Westminster.

7. In an action for bribery, the declaration stated the precept to be directed to the mayor only; but the precept proved was directed to the mayor and burgesses, which was held to prove the declaration. Cuming v. Sibley. E. 9 Geo. 3. C. B. 8. In cases upon contracts it is necessary to set out the contract truly; and a difference in any part is fatal, because the contract is entire. ib 240 9. An indictment for perjury stated the bill and chancery to be directed to Robert Lord Henley, &c. whereas it was to Sir Robert Henley, knt. &c. and the objection was over ruled. The King v. Lookup. T. 7 Geo. 3. B. R. ib. 240

10. In an action on a bail bond, the special original being returnable coram domino rege ubicunque tunc fuerit in Anglia, the omission of the word ubicumque was held not fatal, for the writ is to compel appearance before the king in bis court, and not in person, and therefore it could not, as was objected, be to compel appearance out of England. Shuttleworth v. Pilkington (2 Stra. 1155). 11. Where the contract declared upon was that the defendant should deliver to the plaintiff all his tallow at 4s. per stone; and the contract proved was, that the defendant should deliver it at 4s. per stone, and so much more as the plaintiff paid to any other person; this was held a fatal variance. Churchill v. Wilkins. Page 447 12. In an action against the defendant for negligence as an attorney, in not prosecuting a debtor of the plain- | See Perjury, 6. Variance, 12. tiff's to judgment; the return of the

writ on which the debter was arrested being laid to be in the 25th year of the reign, &c. and the writ itself appearing to be returnable in the 24th year, this was held to be a fatal variance, even though the day of the return was alleged in the declaration under a videlicit. Green v. Bennett. Page 656

13. In an action by the consignor of goods against a carrier for non delivery, where the plaintiff alleged in his declaration that the defendant undertook to deliver, &c. in consideration of the hire to be paid by the plaintiff, and proved that the hire was to be paid by the consignee, it was held not to be a variance; the consignor being liable by law. Moore v. Wilson. 659

### VENUE.

1. The venue in an action for a libel cannot be changed. Pinkney v. Collins, 571, and Clissold v. Clissold. 647 2. In debt on bond, the court upon the application of the defendant, will change the venue to the place where his defence arises, and the plaintiff's as well as the defendant's witnesses reside. Foster v. Taylor.

3. But see several instances where similar applications were refused, when the defendant's witnesses only resided 782 n. in the country. See Trial, 2, 3.

# VENIRE.

See Trial, 2. 3.

#### VENIRE DE NOVO.

1. A court of error cannot award a venire de novo when the proceedings originate in an inferior court. vor w. Wall. 151

2. Whether a venire de novo may be awared by a court of error. Johnstone v. Sutton in Error, Exchq. Ch. 528

# VERDICT.

1. Nothing is to be presumed after verdict to have been proved but what is expressly stated in the declaration, or what is necessarily implied from those facts which are stated. Spieres v. Parker. 141 See Modus, 1.

# VIDELICET.

VISITOR.

VISITOR. See Probibition, 3, 4.

U.

UNDERTAKING. See Agreement.

#### UNIVERSITIES.

1. Statutes allowing certain privileges to the members of the universities are confined to those of the two English universities, unless otherwise expressed. Jones v. Smart. Page 49 See Game, 2.

#### USAGE.

1. Where the words of an act of parliament are doubtful, general usage may be called in to explain them: but where they are clear, the usage of a particular place cannot control them. The King v Hogg. 728

# USE and OCCUPATION.

1. An action for use and occupation may be maintained by a grantee of an annuity, after a recovery in ejectment sgainst a tenant who was in possession under a demise from year to year for all rent in his hands at the time of notice by the grantee, and down to the day of the demise in the ejectment, but not afterwards. Birch v. Wright.

### USURY.

See Usurious Contract.

#### USURIOUS CONTRACT.

- 1. Before a party can entitle himself by a civil action to relief from an usurious contract, he must tender all the money really advanced. Fitzroy v Gwillim.
- 2. Where goods were pawned to a broker for a certain sum, and usurious interest agree to be paid thereupon, the pawner of the goods cannot maintain an action of trover for them in order to get rid of the usurious contract, without first tendering the money which had been actually advanced and legal interest.

w.

#### WAGER.

1 A Wager between two voters with respect to the event of an elec-

tion of a member to serve in parliament, laid before the poll began, is illegal, Allen v. Hearn. Page 56
2. Quere, Whether a wager, that war would be declared against France within three months, is void. Foster v. Thackery Tr. 21 Geo. 3. B. R. cited in Allen v. Hearn.

3. A wager upon the event of a cause in the house of lords or the courts of justice is void, if laid with a lord of parliament or a judge. Allen v. Hearn.

WAGERING POLICY. See Insurance, 19, 20.

WAGER. See Rawom Bill.

WAVER.
See Bill of Exchange, 17.

WARRANT of Attorney. See Attorney.

WARRANTY. See Insurance, 25, 26, 27.

#### WARTE.

- An action of trover cannot be maintained by a tenant in tail expectant on the determination of an estate for life, without impeachment of waste, for timber which grew upon and was severed from the estate. Pyne v. Dor.
- 2. There is a distinction to be taken between waste and destruction, in conformity to the practice of the court of chancery.

  ib. 56
- Tenant for life without impeachment of waste has an absolute property in trees as soon as they are cut down.
- 4 The clause "without impeachment of waste" will not warrant a tenant for life in unleading a house and puling down the tiles. Vane v. Lord Barnard cited in Pyne v. Dor.
- 5. The court of chancery have also prevented a tenant for life wishout impeachment of waste from cutting down an avenue leading to a house, but not all ornamental timber.
- 6 But in the case of Sir Herbert Packingron (3 Att. 215) a court of equity protected trees which were either an ornament or shelter to an house. ib.

7. In

7. In Charlton v. Charlton mentioned by Lord Hardwicke in 3 Atk. 216. Lord Ch. King prevented a tenant for life without impeachment of waste from felling trees in a park. Note, b. Page 65 in Pyne v. Dor.

#### WAY.

1. Under the grant of a free and convenient way for the purpose of carrying tee has a right to lay a framed waggon way. Senhouse v. Christian. 560 2. Under a grant of a way from A. to B., in, through, and along, a particular way, the grantee is not justified in making a transverse road scross the

WEST INDIA TRADE. See Pleading, 6.

#### WILL.

See Devise.

1. Copyhold lands purchased after a will, disposing of all the testator's lands, do not pass by the will. Spring dem. Titcher v. Biles. M. 24 Geo. B. R. 435, n.

#### WITNESS.

- 1. A co-obligor in a bond to the ordinary under 22 and 23 Car. 2, c. 10. is a competent witness to prove a tender by the administratrix. Carter v. Pearce.
- 2. So a creditor of the administratrix is a good witness for the same purpose. ib. 164
- 3. The bare possibility of a witness beingliable to an action in a certain event is no objection to his competen-
- 4. But bail cannot be a witness for the principal. 5. In order to render a witness incom-
- petent, it is necessary to shew that he

must derive a certain benefit from the determination of the cause one way or the other. Page 164

6. Where A. rented a tenement to C. who covenanted to re-imburse him all the poor rates; and A. afterwards underlet to B.; A. was held to be a competent witness to prove such letting to B.; upon an appeal. King v. Woodlands,

coals (among other things) the gran- 7. A person is not a competent witness to impeach a security which he has given, although he is not interested in the event of the suit. Walton v. Shelley. 296

8. So that where a bond was given in consideration of delivering up a promissory note, an indorser was not permitted to prove that the consideration of the note was usurious.

9. Whether a person who is interested in the question put to him, though not in the event of the suit, be a compe-

Дu ? tent witness. An objection to the competency of witnesses, discovered after trial, is not a sufficient ground of itself for applying for a new trial: but it may have some weight with the court where the party applying appears to have merits. Turner v. Pearte.

11 Formerly the rule was to object before the witness was sworn in chief; but still the objection must be made at the trial.

12. Where two persons joined in an assignment of a ship, one of them was permitted to prove that at the time of the assignment he had no interest in the vessel. 301

WRECK.

See Trespass, 5.

WRIT.

See Rule, 1 .

END OF THE FIRST VOLUME.



